Supreme Court, U.S.
FILED

961527 MAR 26 1997

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No.

In The

Supreme Court of the United States

October Term, 1996

AMRUT N. PATEL and SITA PATEL,

Petitioners,

vs.

JAMES F. PENMAN, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. What standard of discretion governs a district court's decision to decline to exercise supplemental jurisdiction over a claim under 28 U.S.C. § 1367(c)?

II. Did petitioners' supplemental claim brought under 28 U.S.C. § 1367(a) substantially predominate over the original jurisdiction claims brought under 42 U.S.C. § 1983?

III. Did petitioners' Fifth Amendment claim under the Fourteenth Amendment control over their Fourth Amendment claim under the Fourteenth Amendment?

LIST OF PARTIES

The names of all parties to the proceedings whose judgment is sought to be reviewed here is the City of San Bernardino only and its name appears in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Petitioners, Amrut N. Pagel and Sita Patel, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 103 F.3d 868 and is reproduced in the Appendix filed herewith at ("App.") "A". The unreported opinions of the district court in this case are reproduced at App. at 1a-28a.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on December 26, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

The pertinent provisions of 28 U.S.C. § 1367 and Article I, § 19 of the California Constitution is set forth below:

> **§ 1367. Supplemental Jurisdiction**
>
> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case of controversy under Article III of the United States Constitution. Such

supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiff under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if —

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

§ 19. Eminent domain; just compensation; possession

Private property may be taken or damages for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

STATEMENT OF THE CASE

This case arises out of circumstances similar to those involved in *Armanderiz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (*en banc*), in which the court reviewed the claims of residential landlords whose properties had been the subject of code-enforcement actions by the City of San Bernardino. 103 F.3d at 870 n. 1, App. 6a.

Amrut and Sita Patel purchased the Super-7 Motel in downtown San Bernardino in 1984. Since at least 1987, the Patels had leased the motel to various lessees. In June 1990, the lease was assigned to Mahendra and Minaxi Desai.

In 1990, the City of San Bernardino designed and implemented a program to inspect all motels within its boundaries for purposes of code-enforcement pursuant to the City's Municipal Code.

On September 4, 1990, the City inspected the motel, pursuant to an administrative warrant, and concluded that it constituted an extreme health and safety hazard and ordered it closed immediately. Residents at the motel were relocated by the City. The City sent Notice to the Patels detailing the code violations and informing them that the violations had to be corrected in 10 days and that permits were required for the repairs.

The Notice also informed them that rooms could not be occupied until the motel passed an inspection by various City agencies, including the Building and Safety Department, the Fire and Police Departments, and the City Attorney's office.

On October 29, 1990, Larry Reed, the Director of the City's Department of Planning and Building Services, wrote the Patels and notified them that the motel had been determined to be a public nuisance in violation of City Ordinances. Reed stated that an emergency abatement of the property had been made in order to protect the health and safety of the community and that the costs of the abatement would be charged to the Patels.

Reed's letter went on to state that a hearing on the matter had been scheduled before the Board of Building Commissioners on December 7, 1990, and informed the Patels that they had the

right to present evidence challenging the abatement at the hearing. On December 7, 1990, the Board met but immediately cancelled its meeting due to lack of a quorum.

The Board of Building Commissioners is the officially constituted body to conduct such hearings pursuant to the City Municipal Code.

A criminal infraction complaint was also filed by the City Attorney against Amrut Patel in the Fall of 1990. The complaint charged 40 counts of violation of the City's Municipal Code, all involving the condition of the motel on the date of its closure. On July 15, 1991, the complaint was dismissed as to Mr. Patel, and Jayanti Morarji, who was Mr. Patel's on-site manager, was substituted as the defendant. Pursuant to a plea bargain, Morarji pled nolo contendre to the first 20 counts of the complaint and was fined $1,330 and ordered to pay restitution of $2,851.55 to the City. The remaining 20 counts were dismissed.

On March 15, 1991, the Patels filed a complaint for inverse condemnation and injunctive and declaratory relief against the City and other defendants in federal court. A first amended complaint was filed on April 24, 1991, before any responsive pleading was filed. Essentially the complaint sought compensation under the due process clause of the Fifth and Fourteenth Amendments. The district court dismissed the complaint nearly a year later for lack of subject matter jurisdiction "due to failure to exhaust state remedies" as required by *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172 (1985).

On March 1, 1992, the Patels filed a Second Amended Complaint alleging federal claims under 42 U.S.C. § 1983 for violations of their constitutional rights to procedural and substantive due process and to equal protection and under 42

U.S.C. § 3604(b) (the Fair Housing Act). The complaint included a supplemental state-law claim of inverse condemnation under Article I, § 19 of the California Constitution. This complaint named as defendants the City, the City's Economic Development Agency, various named city officials (including Penman, Williams, Reed, and Daniel, as well as W.R. Holcomb, the mayor at the time of the closure), and Does 1-100.

On December 2, 1992, the district court granted summary judgment on defendants' motion to all individual defendants (on the basis of qualified immunity and the inapplicability of Art. I, § 19 of the California constitution to individuals) and granted summary judgment on the Fair Housing Act claim to all defendants. The district court also decided to exercise it discretion under 28 U.S.C. § 1367(c) to dismiss without prejudice the Patels' supplemental state-law claim for inverse condemnation.

Three months later, the district court, in response to a summary judgment motion by the defendants, entered an "Order Determining Issues Without Substantial Controversy." It found that no genuine issue of material fact existed: (1) as to the Patels' substantive due process claim "because defendants' actions were not clearly arbitrary and unreasonable, [and] had a substantial relation to public health, safety, morals or general welfare"; and (2) as to the Patels' equal protection claim because the Patels "have been unable to show that other motel properties similarly situated were treated differently."

A trial on the Patels' remaining procedural due process claim against the City was held in January 1995. At the beginning of the next day, the Patels abandoned their claim that their rights to procedural due process were violated by the lack of notice and opportunity to be heard before the motel was closed, so the sole remaining issue was whether the City had violated the

Patels' due process rights by denying them a hearing on the permanent closure of the motel afterwards. The jury returned a verdict in favor of the City, from which the Patels have timely appealed.

The Ninth Circuit reversed the jury verdict in favor of the City, finding there was no evidence that the Patels' obtained notice and opportunity to be heard at a post-deprivation hearing to contest the permanent closure of the motel.

The court further affirmed the entry of summary judgment of the Patels' substantive due process claim, equal protection claim and dismissal of the state law claim against the City.

In affirming the entry of summary judgment on the Patels' substantive due process claim, the court noted that: "The *Armanderiz* court found the plaintiffs' substantive due process claim in that case preempted by both the Fourth and Fifth Amendments. 75 F.3d at 1318. Because the Patels' substantive due process claim is clearly preempted by the Fifth Amendment, we do not analyze whether the Fourth Amendment might also preempt their substantive due process claim." 103 F.3d at 875 n. 7.

REASONS FOR GRANTING THE WRIT

Prior to the enactment of 28 U.S.C. § 1367, this Court consistently recognized "that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right", whose "justification lies in considerations of judicial economy, convenience and fairness to litigants . . ." *United Mine Workers of America v. Gibbs,* 86 S. Ct. 1130 (1966); *Carnegie-Mellon University v. Cahill,* 484 U.S. 343, 354, 108 S. Ct. 514, 619, 918 L. Ed. 2d 720 (1988).

The Court has also emphasized that the *Gibbs* doctrine of pendent jurisdiction "is a doctrine of flexibility, designed to allow courts to deal with cases involving pendent claims in the manner that most sensibly accommodates a range of concerns and values." *Carnegie-Mellon,* 484 U.S. at 350, 108 S. Ct. at 619.

The circuit courts have applied *Gibbs* underlying values to a range of situations not specifically mentioned in *Gibbs. See, e.g., Financial Gen. Bank Shares, Inc. v. Metzger,* 680 F.2d 768, 776 (D.C. 1982) ("[A] federal court should be reluctant to retain pendent jurisdiction over a question for which state jurisdiction gives inadequate guidance."; *Jones v. Fitch,* 665 F.2d 586, 593 (5th Cir. Unit A 1982) (approving a remand of pendent state-law claims in part because of "the existence of an issue of state constitutional law not previously addressed by the state supreme court"); *United States ex. rel. Small Business Admin. v. Pena,* 731 F.2d 8, 15 (D.C. Cir. 1984) ("Moreover, even when *Gibbs* has no application, pendent jurisdiction should sometimes be declined when local law issues are unsettled, complex, or novel.")

This line of cases that applied the *Gibbs* underlying values when the comity concerns in abstention doctrines are implicated has been approved by this Court. *Pennhurst State School & Hosp. v. Holderman,* 465 U.S. 89, 122 n. 32, 104 S. Ct. 900, 920 n. 32, 79 L. Ed. 2d 67 (1984).

28 U.S.C. § 1367(c)(1) appears to derive from the line of cases tacitly approved of in *Pennhurst,* while subsections (c)(2) - (c)(3) appear to derive from *Gibbs* itself. *Gibbs,* 383 U.S. at 726-27, 86 S. Ct. at 1139-40; *Timm v. Mead Corp.,* 32 F.3d 273, 276 n. 1 (7th Cir. 1994).

The circuit courts are split and are in considerable doubt as to whether "the new statute is intended to codify rather than to alter the judge-made principles of pendent . . . jurisdiction", *Brazinski v. Amaco Petroleum Additives Co.*, 6 F.3d 1176, 1182 (7th Cir. 1993); *Whalen v. Carter*, 954 F.2d 1087, 1097 n. 10 (5th Cir. 1992) ("it is unclear whether [section 1367] merely codifies the pendent jurisdiction or actually changes the doctrine in some fashion."); *Executive Software v. U.S. Dist. Court*, 24 F.3d 1545, 1559 n. 12 (9th Cir. 1994); *Lyon v. Whisman*, 45 F.3d 758, 760 n. 4 and n. 8 (3rd Cir. 1995).

28 U.S.C. § 1367(c)(4) permits a district court to decline to exercise supplemental jurisdiction over claims under subsection (a) if — "in exceptional circumstances, there are other compelling reasons for declining jurisdiction."

There is considerable dispute among the courts and commentators as to whether the language in § 1367(c)(4) should be read back into § 1367(c)(1) - (3), in the sense that an exercise of discretion under those categories should be made "only in narrower circumstances than permitted under their *Gibbs* counterparts." *Executive Software*, 24 F.3d at 1557 n. 9.

The wide divergence of opinion between the circuit courts as to the proper interpretation of the statutory text embodied in 28 U.S.C. § 1367(c)(1) - (c)(4) renders certiorari appropriate for this case.

Certiorari is also particularly appropriate in this case since the Ninth Circuit in analyzing petitioners' "substantive due process" claim under the Fourteenth Amendment determined that while there were multiple textual guarantees implicated under the constitution, the claim under the Fifth Amendment predominated over the Fourth Amendment claim.

The holding contravenes this Court's well established precedents, under which the Court has stressed that where the specific guarantees of more than one constitutional provision are implicated, "[t]he proper question is not which Amendment controls but whether either Amendment is violated." *United States v. James Daniel Good Real Property*, __ U.S. __, 114 S. Ct. 492, 499, 126 L. Ed. 2d 490 (1993).

I.

THE STANDARD OF DISCRETION THAT GOVERNS A DISTRICT COURT'S DECISION TO DECLINE TO EXERCISE SUPPLEMENTAL JURISDICTION OVER A CLAIM UNDER 28 U.S.C. § 1367(c) IS AN "EXCEPTIONAL CIRCUMSTANCES" TEST.

The Ninth Circuit reviewed the district court's decision to decline jurisdiction over the Patels' supplemental state law claim for an abuse of discretion. 103 F.3d at 877. (App. 20a-22a).

In this circuit, this means, " '[D]istrict courts are given broad discretion in evaluating whether pendent jurisdiction is appropriate.' " *O'Connor v. State of Nevada*, 27 F.3d 357, 362 (9th Cir. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 1367, 131 L. Ed. 2d 223 (1995).

Construction of a jurisdictional statute enacted by Congress raises foundational issues as a matter of legal process and separation of powers.[1]

Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River Water*

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1. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale, L.J. 71 (1984).

Conservation Dist. v. United States, 424 U.S. 800, 817, 96 S. Ct. 1236, 1246, 47 L. Ed. 2d 483 (1976); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Co.,* 460 U.S. 1, 13, 103 S. Ct. 927, 936 (1983).

This proposition conceptually contains a notion of "constitutional necessity" derived from the privileged status of the doctrine of separation of powers. *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 404 (1921) (Chief Justice Marshall stating: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.")

Congress has the power to limit the jurisdiction of the inferior federal courts. *Lauf v. E.G. Shinner & Co.,* 303 U.S. 323, 330, 58 S. Ct. 578, 582, 82 L. Ed. 872 (1938).

28 U.S.C. § 1367 does not mention the scope of supplemental jurisdiction which a court should exercise.

To determine the scope of the statute, the inquiry begins with the statutory text. *Moskal v. United States,* 498 U.S. 103, 108 (1990) ("in determining the scope of the statute, we look first to its language, giving the words used their ordinary meaning").

Under one construction of the statute, the plain language of 28 U.S.C. § 1367(a) appears to make supplemental jurisdiction mandatory by its use of the term "shall" in contra distinction to *Gibbs* that stressed that courts have discretion to exercise the power conferred upon them under Article III of the United States Constitution to hear pending state law claims. *Gibbs,* 383 U.S. at 726, 86 S. Ct. at 1139; *Lyons,* 45 F.3d at 762 n. 8.

Under this interpretation, if power is conferred under § 1367(a) and not prohibited by § 1367(b), the district courts exercise discretion only in deciding whether to decline jurisdiction under one of the four factors specified in § 1367.

Some of the circuit courts and district courts have found this structural difference to evidence an intent on the part of Congress to have created a strong presumption in favor of the exercise of supplemental jurisdiction.[2] *See Growth Horizons, Inc.*, 983 F.2d 1277, 1285 n. 14 (3rd Cir. 1993). ("The language in § 1367 expressly . . . states that . . . federal courts shall exercise supplemental jurisdiction over pending claims arising out of the same case or controversy and may decline to exercise jurisdiction [as provided by § 1367(c)]."); *Picard v. Bay Area Regional Transit Dist.*, 823 F. Supp. 1519, 1523 (N.D. Cal. 1993) (conducting a two step analysis as prescribed by the statutory structure); and *see* 13B Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 3567.3 at 39 (Supp. 1996). ("The circumstances in which a court may exercise discretion to refuse to hear a case within its supplemental jurisdiction are quite strictly defined.")

Moreover, the plain language of 28 U.S.C. § 1367(c)(4) is considerably narrower than the *Gibbs* counterpart. The term "exceptional circumstances" clearly brings to mind its analogous use by the Court in the area of *Colorado River* abstention, where the Court has used the term to denote " 'an extraordinarily narrow exception to the duty of a District Court to adjudicate a controversy properly before it.' " *Moses H. Cone Hosp.*, 460 U.S. at 14, 103 S. Ct. at 936 (*quoting Colorado River Water Conservation Dist.*, 424 U.S. at 813, 96 S. Ct. at 1244).

Moreover, the prior version of § 1367(c) reads almost

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2. John B. Oakley, *Recent Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvement Acts of 1988 and 1990*, 24 U.C. Davis L. Rev. 735, 766-67 (1991).

precisely as it does now, except that § 1367(c)(4) provided that supplemental jurisdiction may be declined if "there are other appropriate reasons, such as judicial economy, convenience, and fairness to the litigants for declining jurisdiction." *Federal Courts Study Committee Implementation and Civil Justice Report Act; Hearings on H.R. 5381 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice,* 101st Cong. 2nd Sess. 722 (1991).

The change in the final text of § 1367(c)(4) appears to indicate an intent on the part of Congress to transform a substantive change in the law making supplemental jurisdiction not a doctrine of discretion but of plaintiff's presumptive right.

II.

PETITIONERS' SUPPLEMENTAL STATE LAW CLAIM BROUGHT UNDER 28 U.S.C. § 1367(a) DID NOT SUBSTANTIALLY PREDOMINATE OVER THE ORIGINAL JURISDICTION CLAIMS BROUGHT UNDER 42 U.S.C. § 1983.

Under a *Colorado River* "exceptional circumstances" test of review, "only the clearest of justifications will warrant dismissal." *Colorado River Water Conservation Dist.,* 424 U.S. at 819, 96 S. Ct. at 1247.

This requires "a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required." *Colorado River Water Conservation Dist.,* 424 U.S. at 819, 96 S. Ct. at 1247.

Petitioners do not advocate that the decision to decline supplemental jurisdiction rests on a mechanical checklist, "but

on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction." *Moses H. Cone Memorial Hosp.*, 460 U.S. at 17, 103 S. Ct. at 937.

However, a *de minimus* requirement under this standard should require of the district court to specify the factors it relied upon with a specific finding as to which subsection of § 1367(c) applies.

This is no such requisite finding in the record. *See* App. 29a-44a.

The failure by the district court to make a specific finding as to which of the criteria of § 1367(c)(1) - (4) applied in the instant case forced the Ninth Circuit to speculate that "the district court appears to have decided that the state law claim for inverse condemnation substantially predominated over the § 1983 claim against the City for due process and equal protection violations, a permissible ground for declining supplemental jurisdiction under § 1367(c)(2)." 103 F.3d at 877, App. 21a.

The district court expressly stated that § 1367(c) "is the codification of the old rule of *United Mineworkers v. Gibbs*. It is almost a precise linguistic adaptation of that case." App. 32a.

The district court then dismissed the Patels' supplemental state law claim because "the thrust of the claim and what must be proved is that there is a public use taking, using a substantial factor test. There is a lot of different evidence; there's a lot of different theories." 103 F.3d at 877, App. 21a and 32a.

The district court's reasons for dismissing the supplemental state law claim appears to embody *Gibbs'* concern that "if it appears that the state issues substantially predominate, whether

in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedies sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals. *United Mineworkers of America,* 383 U.S. at 726-727, 86 S. Ct. at 1139.

However, that should not have terminated the analysis, since even under *Gibbs* "there may, on the other hand, be situations in which the state claim is so closely tied to questions of Federal policy that the argument for exercise of pendent jurisdiction is particularly strong." *United Mineworkers of America,* 383 U.S. at 727, 86 S. Ct. at 1139.

In *Gibbs* the allowable scope of the state claim implicated the federal doctrine of pre-emption, which the *Gibbs* court determined relevant to the exercise of discretion. *United Mineworkers of America,* 383 U.S. at 727, 86 S. Ct. at 1139.

Time-honored constitutional doctrine holds that a federal court may resolve a case solely on the basis of a pendent state-law claim, and that in fact the court should usually do so in order to avoid federal constitutional questions. *Pennhurst State School & Hosp.*, 465 U.S. at 118, 104 S. Ct. at 917 (*citing Siler v. Louisville & N.R. Co.*, 213 U.S. 175, at 192-193, 29 S. Ct. 453 at 455 and *Ashwander v. TVA,* 297 U.S. 288, 347, 56 S. Ct. 466, 483, 80 L. Ed. 688 (1936)); *Schmidt v. Oakland Unified School District,* 457 U.S. 594, 102 S. Ct. 2612, 73 L. Ed. 2d 245 (*citing Hagans v. Lavine,* 415 U.S. 528, 546, 94 S. Ct. 1372, 1383, 39 L. Ed. 2d 577 (1974) and *United Mineworkers of America*).

Relevant to the discussion of whether to exercise jurisdiction in this case is the almost identical language in Article I, § 19 of the California Constitution with the language embodied in the Fifth Amendment to the United States Constitution requiring

payment of just compensation for public use taking by government.

The California Supreme Court has noted: "Both eminent domain proceedings and inverse condemnation actions implement the constitutional rule that private property may not be 'taken' (U.S. Const., 5th Amend.) or 'taken or damaged' (Cal. Const., Art. I, § 19) for public use without 'just compensation.' " *San Diego Gas and Electric Company v. The Superior Court of Orange County,* 55 Cal. Rptr. 2d 724, 752 (Cal. 1996).

One of the modalities of an inverse condemnation action under Article I, § 19 of the California Constitution is when, "a public entity . . . physically invades that property in any tangible manner." *San Diego Gas and Electric Company,* 55 Cal. Rptr. 2d at 753.

Article I, § 19 of the California Constitution is the "adequate state remedy" which must be exhausted under *Williamson County* in order to confer upon the federal court subject matter jurisdiction for a takings claim under the Fifth Amendment to the United States Constitution.

However, litigating the state law claim with the remaining federal claims would obviate the need of the Patels' further litigating a Fifth Amendment taking claim in the federal courts, and avoid the central constitutional concerns of *Williamson County.*

III.

PETITIONERS' FIFTH AMENDMENT CLAIM UNDER THE FOURTEENTH AMENDMENT CLAIM DID NOT CONTROL OVER THEIR FOURTH AMENDMENT CLAIM UNDER THE FOURTEENTH AMENDMENT.

This Court has repeatedly recognized that "[c]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands." *Soldal v. Cook County,* 506 U.S. 56, 69, 113 S. Ct. 538, 548, 121 L. Ed. 2d 450 (1992).

While the Takings Clause "provides an explicit textual source of constitutional protection" against the type of conduct challenged by the Patels in their substantive due process claim, the Takings Clause does not exhaust the guarantees afforded them under the Constitution. *Albright v. Oliver,* 510 U.S. 266, 273-74, 114 S. Ct. 807, 813, 127 L. Ed. 2d 114 (1994) (Rehnquist, C.J., for plurality) (*quoting Graham v. Connor,* 490 U.S. 386, 395, 109 S. Ct. 1865, 1871, 104 L. Ed. 2d 443 (1989)).

The Fourth Amendment protects property interests as well as expectations of privacy, *Soldal,* 506 U.S. at 62-69, 113 S. Ct. at 544-48, and "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in their property." *United States v. Jacobsen,* 466 U.S. 109, 113, 104 S. Ct. 1652, 1656, 80 L. Ed. 2d 85 (1984).

In this case, government meaningfully interfered with the Patels' possessory interests in their property by closing down the motel, relocating tenants, and by their post-closure actions asserting control over the property.

Even if the Patels' taking claim under the Fifth Amendment is unripe under *Williamson County,* their Fourth Amendment claim requires separate consideration to determine whether that Amendment has been violated.

The Ninth Circuit seems to have also adopted a pleading requirement under *Graham* that unless the explicit textual guarantee is specifically plead under 42 U.S.C. § 1983 it will "preclude" a pleading claiming violations under a generalized notion of "substantive due process". 103 F.3d at 875 n. 7, App. 16a. *Aramanderiz,* 75 F.3d at 1324 n. 9.

It seems apparent that *Graham* and the Court's subsequent holdings do not imply a specific pleading requirement since this would contradict the Court's ruling that the "heightened pleading standard" embodied in Rule 9 of the Federal Rules of Civil Procedure does not apply to 42 U.S.C. § 1983 actions brought under *Monell v. Department of Social Services,* 436 U.S. 658, 691, 98 S. Ct. 2018, 2036. *Leatherman v. Tarrant County Narcotics Unit,* __ U.S. __, 113 S. Ct. 1160 (1993).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED DECEMBER 26, 1996

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMRUT N. PATEL; SITA PATEL,
Plaintiffs-Appellants,

v.

JAMES F. PENMAN, City Attorney; COMMUNITY REDEVELOPMENT AGENCY OF THE CITY OF SAN BERNARDINO; BUILDING AND SAFETY DEPARTMENT OF THE CITY OF SAN BERNARDINO; HOUSING AND COMMUNITY DEVELOPMENT DEPARTMENT OF THE CITY OF SAN BERNARDINO,
Defendants-Appellees.

No. 95-55213
D.C. No. CV-91-01420-RG
OPINION

Appeal from the United States District Court
for the Central District of California
Richard A. Gadbois, Jr., District Judge, Presiding

Argued and Submitted
June 6, 1996—Pasadena, California

Filed December 26, 1996

Before: Betty B. Fletcher, Robert R. Beezer and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Fletcher

Appendix A

SUMMARY

Individual Rights/Constitutional Rights

The court of appeals affirmed in part and reversed in part a district court judgment. The court held that the Takings Clause preempts a substantive due process claim that a city closed a motel for code violations to drive the motel out of business.

Appellants Amrut and Sita Patel owned the Super-7 Motel in San Bernardino. In 1990, the city implemented a program to inspect all motels. In September 1990, the city inspected the Super-7 motel and concluded that it constituted an extreme health and safety hazard and ordered it closed immediately. The city sent notices to the Patels detailing the code violations, and informing them that the violations had to be corrected in 10 days and that permits were required for the repairs. On October 29, the city notified the Patels by letter that the motel had been found to be a public nuisance and that a hearing on the matter had been scheduled for December 7. The December 7 meeting was canceled due to lack of a quorum.

In a September 1990 newspaper article, James Penman, the city attorney, described the success of the inspection program, noting that motel closures in the downtown area had forced welfare recipients living in filthy motel rooms to other cities and had led to a decrease in crime. In a January 1991 memo, Debra Daniel, the code compliance supervisor noted that if motel owners were allowed to rehabilitate or operate under conditional-use-permit requirements only a temporary solution would be created for substandard conditions and blight of motels in the downtown area.

The Patels sued the city in federal court. The Patels claimed that the city violated their substantive due process rights by

closing the motel for code violations and refusing to issue them a building permit to drive the motel out of business; that the city violated their right to equal protection by selectively enforcing the building code against them so as to prevent the reopening of the motel; and, that the city violated their procedural due process rights by not affording them notice and an opportunity for a hearing after the city closed down their motel as a nuisance.

The district court dismissed a state-law claim for inverse condemnation. The court granted summary judgment for the defendants on the substantive due process and equal protection claims. A jury returned a verdict in favor of the city on the procedural due process claim. The Patels appealed.

[1] Where a particular amendment provides an explicit textual source for constitutional protection against a particular government behavior, that amendment not the more generalized notion of substantive due process must be the guide for analyzing the claims.

[2] If the city closed the motel for code violations and refused to issue building permits necessary for the Patels to bring the motel into compliance to drive the motel out of business, such actions would constitute a taking of the Patels' property. Because the Takings Clause provided an explicit source of constitutional protection against the type of conduct challenged, that clause preempted the Patels' substantive due process claim. [3] Summary judgment on the substantive due process claim was proper.

[4] The inspections that led to the closure could not have violated the Patels equal protection rights since similarly situated property owners, those who owned motels within San Bernardino's boundaries, were inspected.

[5] The Daniel memo listed five motels, including the Patels, that had been closed, thus making it clear that the

Patels were not singled out for closure. To the extent that the Patels meant to argue that only motels located downtown, rather than in other areas of the city were closed, they offered no evidence to suggest that non-downtown motels with code violations similar to theirs were not closed or that the closure of the downtown motels was a city action based on an irrational distinction and thus violative of equal protection.

[6] The Penman article and the Daniel memo raised serious questions and suggested that what was really at stake was not merely forcing the motels to comply with all applicable codes but rather eliminating them entirely. If that were true, the code-enforcement rationale would be the type of pretextual rationale that the Ninth Circuit's equal protection decisions have forbidden. But the Patels made far less of a showing on the question of pretext than the plaintiffs in those decisions did. [7] Summary judgment on the equal protection claim was proper.

[8] The district court appeared to have decided that the state-law claim for inverse condemnation substantially predominated over the due process and equal protection claims. This was a permissible ground for declining supplemental jurisdiction.

[9] No evidence was presented to the jury to prove that the Patels were given notice and an opportunity to be heard after the closure of the motel. A city official testified that the October 27 letter notifying the Patels of the December 7 hearing was given to his clerical staff, but that he did not know if the letter was mailed to or received by the Patels. Mr. Patel testified he never received the letter, and the city did not introduce the statement to the contrary in his prior sworn deposition to impeach him. Nor was there any opportunity to be heard on December 7 even if the Patels had been sent the letter because

the meeting was canceled. Judgment on the procedural due process claim had to be reversed.

[10] The Patels did not preserve for appeal the question of whether the district court's denial of their motion for judgment as a matter of law at the end of the city's re-opening statement was proper.

COUNSEL

Frank A. Weiser, Los Angeles, California, for the plaintiffs-appellants.

Robert L. Simmons, Senior Deputy City Attorney, Cynthia Ludvigsen, San Bernardino, California, for the defendants-appellees.

OPINION

FLETCHER, Circuit Judge:

Amrut and Sita Patel appeal the jury verdict against them on their § 1983 claim alleging that the City of San Bernardino violated their procedural due process rights by not affording them notice and an opportunity for a hearing after the City closed down their motel as a nuisance. The Patels also appeal the district court's summary judgment for the City on their § 1983 claims of alleged violations of substantive due process and equal protection, as well as the district court's decision declining to exercise supplemental jurisdiction over their inverse-condemnation claim based on the California constitution. We have jurisdiction over the appeal pursuant to 28 U.S.C. § 1291 and affirm in part and reverse in part.

Appendix A

FACTUAL BACKGROUND[1]

The Patels purchased the Super-7 Motel in downtown San Bernardino in 1984. The motel apparently contains approximately 40 rooms, and appears to have been occupied primarily by short- and medium-term residents rather than by transient travelers.[2] The City alleged in moving papers below that in the three years before 1990 the City's police department reported over 300 calls to the motel for assistance with illegal activity and that the motel had been the site of "numerous drug and narcotic busts and prostitution arrests".

Since at least 1987, the Patels had leased the motel to various lessees. In June of 1990, the lease was assigned to Mahendra and Minaxi Desai.

In 1990, the City designed and implemented a program to inspect all motels within its boundaries.[3] In March of that

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[1]This case arises out of circumstances similar to those involved in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc), in which the court reviewed the claims of residential landlords whose properties had been the subject of code-enforcement actions by the City.

[2]A 1990 City-conducted survey of the occupants of 15 of the 20 occupied rooms at the motel found that nine rooms had been occupied for one to four weeks, four rooms had been occupied for two to three months, one room had been occupied for six months, and one room had been occupied for seven years.

[3]In an article published in the 17 September 1990 edition of the *San Bernardino Sun*, James Penman, the City's elected city attorney, discussed the program:

> A room-to-room motel survey revealed that San Bernardino has become a repository for parolees and welfare recipients from other communities. A growing number of families come to California because they have heard that the welfare benefits are greater here than in their home states. Many of these families stop in San Bernardino.
>
> Welfare recipients choose a motel from a list provided by the Department of Public Social Services. There are 31 motels on this list — 24 in San Bernardino, seven in other cities. Public funds pay rent to these motels of as much as $700 to $800 per month per family.

year, the City issued a "Notice of Violation" regarding the motel, specifying numerous violations and indicating that four

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. . . .

We have found as many as 12 people, mostly children, in rooms with a maximum legal capacity of two. These rooms are usually filthy and insect infested. Putrid smells permeate walls, floors and ceilings.

. . . .

One year ago, crime in downtown San Bernardino had far surpassed crime in every other area of the city. Robberies, burglaries, rapes, prostitution, gangs and other crimes appeared to be our downtown's future.

Then, in March, the city closed down a large motel on D Street. The three to five burglaries a day in the vicinity dropped to zero. Vandalism at adjacent businesses disappeared. Prostitutes and drug dealers left nearby street corners. Legitimate business improved.

In June, another motel was closed on Fifth Street. Police officers reported an immediate 15 percent decrease in their calls in that area.

. . . .

More than 40 families have been relocated to permanent housing — some of it outside San Bernardino, some within the city. We will continue to move people out of motels in San Bernardino. Those whom we know to be involved in criminal activity will be lawfully encouraged to relocate outside of our city, and preferably, outside of our county. The city will not subsidize this relocation beyond providing trucks and vans to physically move those who voluntarily request transportation.

. . . .

Closing motels and enforcing building codes at motels that remain open will not, of itself, eliminate crime in our downtown. But we will help reduce it.

As soon as we finish with the motels, we will increase our attacks on substandard apartment units found throughout San Bernardino.

We're also sending a message to parolees and to the Department of Public Social Services ... [W]e'll no longer be the dumping ground for parolees and chronic welfare recipients from other states and communities.

units had been "abated" and posted as "dangerous." The Notice stated that the violations had to be corrected within ten days and that permits were required for the work needed to bring two units into compliance. A second Notice of Violation was issued the following month.

In May 1990 another Notice of Violation was issued, apparently regarding violations on the grounds of the motel rather than in the rooms. This Notice included a note directing that rooms not be rented until the violations were corrected because the motel was in violation of its "conditions of approval."

A "Notice to Abate Nuisance" was issued on August 27, 1990 and listed at least 14 code violations at the motel. The Notice, which identified Mahendra Desai as the property owner, indicated that the "nuisance(s)" must be corrected by September 10th, and stated that if the owner objected to the determination of a nuisance, he "must file a written protest to the City Clerk no later than 10 days from the date of this notice." The Notice also stated that four units were closed due to unfit conditions and could not be rented until corrections were made. Mr. Patel stated in a sworn declaration that he received a copy of this Notice in the mail from Mr. Desai. On August 29, 1990, Mr. Desai apparently obtained building permits to conduct repairs.

On September 4, 1990, pursuant to an administrative warrant, the City inspected the motel. City Attorney James Penman, investigators from the City Attorney's office, Code Compliance Supervisor Debra Daniel, several code compliance officers, and a fire department inspector were present at the inspection. The inspection found code violations including faulty plumbing, illegally installed kitchens, exposed electrical wiring, roach infestation, and missing smoke detectors. The City officials concluded that the motel constituted an extreme health and safety hazard to the residents and ordered

it closed immediately. Residents were apparently provided with relocation assistance by the City.

The City appears to have acted pursuant to Chapter 15.28 of the San Bernardino Municipal Code on "Dangerous Buildings." Section 15.28.140(A) gives the City building official the "summary power to secure from entry any structure which in his discretion he determines to be immediately dangerous or hazardous, or in any other manner injurious to public health or safety ... using methods at his discretion to accomplish the purpose which are most appropriate under the circumstances." Section 15.28.150 allows the building official to use the same procedures "in connection with the summary abatement of all other nuisances upon private property which the building official determines in his discretion to constitute an immediately dangerous or hazardous condition." Section 15.28.140(C) requires the building official, "immediately after" securing a dangerous building, to "mail a notice to the owners" of the property informing them:

> (1) that he has secured the structure;
>
> (2) the cost incurred by the City thereby;
>
> (3) that he has posted signs as provided by this section;
>
> (4) the reasons why he has taken the action;
>
> (5) that an appeal may be made within ten days to the Board of Building Commissioners, to be set for hearing at the next regular meeting;
>
> (6) that if his action is not annulled by the Board of Building Commissioners, the cost of securing the property shall become a lien upon the real property unless the cost is paid to the City within thirty days of the mailing of the notice.

Appendix A

Section 15.28.140(D) governs appeals to the Board.

A. L. Williams, a code compliance officer for the City, issued a "Notice to Abate Nuisance" on September 4th. The Notice identified "Mahendra B. Desai (agent for Patel)" as the owner and stated that the motel's units were closed "due to safety violations, operating a business without a business license or a proper [certificate of occupancy, and] substandard conditions in this complex." The Notice stated that the owner or his agent could not repair or improve the premises without a proper permit and that rooms could not be occupied until the motel passed an inspection by the building and safety department, the fire and police departments, and the city attorney's office. The Notice stated that the owner had until September 14, 1990 to apply for permits to make repairs and that the owner had 10 days from the date of the notice to file a written protest with the City Clerk's office if the determination of a nuisance was contested. Desai, in a sworn declaration, stated that he immediately sent a copy of the notice to Mr. Patel. Mr. Patel stated in a sworn declaration that he received a copy of this notice from Mr. Desai, though Patel testified at trial that he had never received the document.

On September 26, 1990, Williams wrote a letter to the Patels, addressed to them at their address in Upland, California, which stated that it constituted service of a "Correction Notice" as to the motel. Attached to the letter was a two-page "Unit Inspection Report", prepared on September 10, 1990, that detailed the code violations at the motel found during the September 4, inspection. The report indicated that the violations had to be corrected in 10 days and that permits were required for the repairs; the letter stated the same instructions and requested that the Patels "contact this office within ten (10) calendar days from the date of this notice to make arrangements to correct [the] violations." The report indicates that a copy was mailed to the owner by certified mail on September 26, 1990. Although Mr. Patel testified at trial that he had never received this letter, he stated in his sworn declara-

tion that he received the letter on or about September 27, 1990.

In his sworn declaration, Mr. Patel stated that within the ten-day period specified in the September 26th letter he went to the City's planning and building department to apply for building permits to repair the motel and that he was told by Daniel that building permits would not be issued at that time. At trial, under cross-examination, Mr. Patel testified that he had never applied for building permits to rehabilitate the motel.

On October 29, 1990, Larry Reed, the director of the City's Department of Planning and Building Services, wrote the Patels and notified them that the motel had been determined to be a public nuisance in violation of city ordinances. It is unclear whether this determination refers to the violations cited in the September 4 and September 26 notices or whether it is a new determination based on the unoccupied state of the motel after the closure. Reed stated that an emergency abatement of the property had been made in order to protect the health and safety of the community and that the costs of the abatement amounted to $598.34, which the Patels should remit to the city clerk's office within 30 days. Mr. Patel testified at trial that he had never received this letter personally or by mail, but in his sworn declaration he stated that he received the letter on October 29.

The October 29 letter also stated that a hearing on the matter had been scheduled before the Board of Building Commissioners on December 7, 1990 at 9:00 a.m. and informed the Patels that they had the right to present evidence challenging the abatement at the hearing. On December 7, the Board met but immediately cancelled its meeting due to lack of a quorum.

Mr. Patel stated in his declaration that he went to the planning and building services department during the last week of

November 1990 to obtain building permits for repairs to the motel but that the permits were denied. At trial, under cross-examination, Mr. Patel testified that he had never applied for building permits to rehabilitate the motel.

A criminal complaint was also filed by the City against Amrut Patel in the fall of 1990. The complaint charged 40 counts of violation of the City's municipal code, all involving the condition of the motel on September 4, 1990. After numerous continuances, the complaint was dismissed as to Mr. Patel on July 15, 1991, and Jayanti Morarji, who was apparently the Patels' on-site manager, was substituted as defendant. On the same day, pursuant to a plea bargain, Morarji pled nolo contendere to the first 20 counts of the complaint and was fined $1,330 and ordered to pay restitution of $2851.55 to the City; the remaining 20 counts were dismissed.

PROCEEDINGS BELOW

The Patels on March 15, 1991, filed a complaint for inverse condemnation and injunctive and declaratory relief against the City and other defendants in federal court. A first amended complaint was filed on April 24, 1991, before any responsive pleading was filed. Essentially the complaint sought compensation for a taking under the Fifth and Fourteenth Amendments. The district court dismissed the complaint nearly a year later for lack of subject matter jurisdiction "due to failure to exhaust state remedies" as required by *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985).

On March 1, 1992, the Patels filed a Second Amended Complaint alleging federal claims under 42 U.S.C. § 1983 for violations of their constitutional rights to procedural and substantive due process and to equal protection and under 42 U.S.C. § 3604(b) (the Fair Housing Act); the complaint included a supplemental state-law count for inverse condem-

nation under Article 1, § 19 of the California Constitution. This complaint named as defendants the City, the City's Economic Development Agency, various named city officials (including Penman, Williams, Reed, and Daniel, as well as W. R. Holcomb, the mayor at the time of the closure), and Does 1-100.

On December 2, 1992, the district court granted summary judgment on defendants' motion to all individual defendants (on the basis of qualified immunity and the inapplicability of Art. I, § 19 of the California constitution to individuals) and granted summary judgment on the Fair Housing Act claim to all defendants. The Patels have not appealed from those rulings. The district court also decided to exercise its discretion under 28 U.S.C. § 1367(c) to dismiss without prejudice the Patels' supplemental state-law claim for inverse condemnation. The Patels have appealed from this dismissal.

Three months later, the district court, in response to a summary judgment motion by the defendants, entered an "Order Determining Issues Without Substantial Controversy." It found that no genuine issue of material fact existed (1) as to the Patels' substantive due process claim "because defendants' actions were not clearly arbitrary and unreasonable, [and] had a substantial relation to public health, safety, morals or general welfare" and (2) as to the Patels' equal protection claim because the Patels "have been unable to show that other motel properties similarly situated were treated differently."

A trial on the Patels' remaining procedural due process claim against the City[4] was held in January 1995. At the beginning of the next day, the Patels abandoned their claim that their rights to procedural due process were violated by the

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[4]A joint pre-trial conference order filed by the parties on March 29, 1993 indicated that the City was the sole remaining defendant; the Economic Development Agency had apparently been dismissed by consent of the parties.

lack of notice and opportunity to be heard *before* the motel was closed, so the sole remaining issue was whether the City had violated the Patels' due process rights by denying them notice and an opportunity to be heard after the closure of the motel. The jury returned a verdict in favor of the City, from which the Patels have timely appealed.

DISCUSSION

Alleged Pretrial Errors

I. Summary Judgment

The Patels appeal the district court's grant of summary judgment for the City on their claims of substantive due process and equal protection. A grant of summary judgment is reviewed *de novo*. *Jesinger v. Nevada Federal Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994).

A. Substantive Due Process

Appellants argue that the City violated their substantive due process rights not merely by closing the motel but by refusing to grant building permits necessary to make repairs that would cure the cited violations and allow the Patels to reopen the motel. The gravamen of the Patels' argument is that the City acted to drive the motel out of business.[5] In opposing the City's motion for summary judgment on this claim, the Patels pointed to (1) the declaration of their attorney on his unsuccessful attempts to reach an agreement with the City to allow the motel to reopen; (2) Mr. Patel's declaration that he applied for building permits after the motel closure but that the appli-

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[5]Although the Patels' complaint alleged that the City acted "with the motive and intent of depressing the property value in order that the City would eventually 'acquire' the property, either directly or indirectly, for other, possibly commercial, purpose [sic]," they appear to have offered no support for this allegation in order to raise a genuine issue of material fact sufficient for the court to deny summary judgment.

cation was denied; and (3) a January 9, 1991 memo from Daniel to Reed inquiring as to the status of proceedings to revoke the conditional use permits of the closed motels, including the Patels', in which Daniel states that pre-permit inspections have been completed and she expects the owners to request building permits which could not be denied in the absence of a court order and that "[i]f motel owners are allowed to rehabilitate or operate under existing approved [conditional-use-permit] requirements a temporary solution only will be created for substandard conditions and blight of motels in our downtown area".

[1] To establish a violation of substantive due process in this context, a plaintiff is ordinarily required to prove that a challenged government action was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare". *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926); *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988). However, "[w]here a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing [a plaintiff's] claims'." *Albright v. Oliver*, 510 U.S. 266 ___, 114 S. Ct. 807, 813 (1994) (Rehnquist, C.J., for plurality) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)).

[2] Here, the Patels challenge government conduct that is explicitly limited by the Takings Clause of the Fifth Amendment.[6] If the City did in fact close the motel for code violations and refuse to issue building permits necessary for the Patels to bring the motel into compliance all in order to drive the motel out of business, such actions would constitute

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[6]The Takings Clause is made applicable to the States by the Due Process Clause of the Fourteenth Amendment. *See Dolan v. City of Tigard*, ___ U.S. ___, ___ n.5, 114 S. Ct. 2309, 2316 n.5 (1994); *Armendariz v. Penman*, 75 F.3d 1311, 1320 (9th Cir. 1996) (en banc).

a taking of the Patels' property. *See Armendariz v. Penman*, 75 F.3d 1311, 1321 (9th Cir. 1996) (en banc) (alleged scheme "to evict tenants, deprive [owners] of rental income that could have been used to bring the buildings into compliance, prevent owners from learning what repairs were necessary to come into compliance, and invent new violations after [owners] had conducted repairs that would bring their properties into compliance." all in order to cause owners to lose properties in foreclosure, "would constitute a taking"). Because the Takings Clause "provides an explicit textual source of constitutional protection" against the type of conduct challenged by the Patels, that clause preempts the Patels' substantive due process claim. *Graham*, 490 U.S. at 395; *Armendariz*, 75 F.3d at 1324.[7]

The Patels did plead a takings claim under the Fifth and Fourteenth Amendments in their original and First Amended Complaints. The district court dismissed that claim as unripe under the doctrine of *Williamson County*.[8] In the Second Amended Complaint, the Patels pled as part of their § 1983 claim for violations of substantive due process that the City "acted with the motive and intent of depressing the property value in order that the City would eventually 'acquire' the property, either directly or indirectly, for other, possibly commercial, purpose [sic]." This allegation was not in the context

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[7]The *Armendariz* court found the plaintiffs' substantive due process claim in that case preempted by both the Fourth and Fifth Amendments. 75 F.3d at 1318. Because the Patels' substantive due process claim is clearly preempted by the Fifth Amendment, we do not analyze whether the Fourth Amendment might also preempt their substantive due process claim.

[8]As this court has described it, *Williamson County*

> established two prerequisites to the maintenance of a federal claim for taking. The first is that the state action alleged to constitute the taking must be a final action .... The second ... is that a plaintiff must seek compensation through the procedures the state has provided before a claim of taking is ripe.

Schnuck v. City of Santa Monica, 935 F.2d 171, 173 (9th Cir. 1991).

of a takings claim, only substantive due process. In *Armendariz*, the court noted that because the plaintiffs in that case were alleging that their property had been taken by the City for a private purpose, the plaintiffs there "would not need to seek compensation in state proceedings before filing a federal takings claim under the rule of *Williamson County*." 75 F.3d at 1220-21 n.5. However, the Patels did not make such an allegation in their First Amended Complaint and, in any case, have not appealed the dismissal of that complaint on ripeness grounds.

[3] Because the Patels' substantive-due-process claim is preempted under *Graham* by the Takings Clause, we affirm the district court's grant of summary judgment on this claim.

B. Equal Protection

The Patels argue that the City violated their right to equal protection of the laws by selectively enforcing the building code against them so as to prevent the reopening of the motel.

When a government's action does not involve a suspect classification or implicate a fundamental right, it will survive constitutional scrutiny for an equal protection violation as long as it bears a rational relation to a legitimate state interest. *New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976); *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990).

[4] As an initial matter, it is entirely unclear what distinction the City has allegedly drawn that the Patels are challenging. Their complaint alleges a denial of equal protection "in that the action directed at [the Patels] were not directed at or carried out in a similar fashion as to other similarly situated residential properties in other areas of the City." This allegation might be read to challenge an alleged distinction between motels in downtown San Bernardino and those in other areas of the city. However, the district court found in December 1992, in ruling on an earlier summary judgment motion by the

City, that the City "devised and implemented a program systematically to inspect all motels in the city." The Patels have not challenged this order on appeal and in fact appear to have conceded that finding in arguing their opposition to the City's summary judgment motion on the equal-protection and due-process claims, in which they describe the City's action as taken "pursuant to a policy and program ... devised and implemented in 1990 to systematically inspect all motels, including Plaintiffs'." The Patels have offered no evidence to create a genuine issue of material fact that this inspection program was carried out only in downtown San Bernardino. We do not suggest that such a program so limited necessarily would have violated Patel's equal protection rights. In any event on this record the inspections that led to the closure could not have violated the Patels' rights, since similarly situated property owners — those who owned motels within San Bernardino's boundaries — were inspected.

[5] As to the closure of the motel, the Patels have not raised a genuine issue of material fact sufficient to survive summary judgment. The only relevant evidence put forward by the Patels is Penman's newspaper article and Daniel's memo inquiring as to the status of proceedings to revoke the Conditional Use Permits of closed downtown motels. That memo lists five motels (including the Patels') closed between 15 June and 10 October 1990, thus making it clear that the Patels were not singled out for closure. To the extent that the Patels mean to argue that only motels located downtown, rather than in other areas of the city, were closed, however, they have offered no evidence whatsoever to suggest that non-downtown motels with code violations similar to theirs were not closed. Even if such evidence were material, none has been adduced. The Patels have failed to create a genuine issue of material fact that the closure of the downtown motels was City action based on an irrational distinction and thus violative of equal protection.

[6] As to the inability of the Patels to obtain permits to remedy the code violations at the motel, the Patels have also

failed to raise a genuine issue of material fact as to an equal-protection violation. The Penman article and the Daniel memo do raise serious questions and suggest that what was really at stake was not merely forcing the motels to comply with all applicable city health and safety codes but rather eliminating them entirely. If the City was in fact using its code enforcement process not to enforce compliance with the codes but rather to drive the downtown motels out of business, then the code-enforcement rationale that the City offers to justify its action would be the type of pretextual rationale that this court's equal-protection decisions forbid. *See Armendariz*, 75 F.3d at 1327 (where plaintiffs alleged City targeted them for code enforcement in order to obtain their properties at reduced value so as to replace low-income housing with commercial development, they "raised a triable issue of fact as to whether the [City's] asserted rationale of directing efforts to enforce the housing code at high-crime areas was merely a pretext"); *Lockary*, 917 F.2d at 1155-56 (plaintiffs stated equal-protection claim by raising triable issues of fact as to whether water shortage asserted as rationale for denying water hookups was pretextual). The Patels, however, have made far less of a showing as to a genuine issue of material fact on the question of pretext than did the plaintiffs in *Armendariz* and *Lockary*. *See Armendariz*, 75 F.3d at 1327 (affidavit by commercial developer detailing meetings with city officials to plan commercial development to replace plaintiffs' buildings, stating that officials asked him to purchase properties as a "strawman," recounting discussions on how to suppress value of plaintiffs' properties, and stating that he gave officials a list of properties to be considered; evidence that when code-enforcement sweeps began, 33 of 35 buildings targeted had been on developer's list); *Lockary*, 917 F.2d at 1155-56 (affidavits showing that, following imposition of moratorium on new water hookups due to alleged water shortage, local water consumption had risen by 70%, water storage capacity had risen by 1100%, utility had provided water for secondary units and swimming pools, utility had voluntarily relinquished

rights to certain water sources, utility had leakage rate double that of accepted norms, and utility had sufficient water to permit population growth).

Furthermore, the Patels have offered absolutely no evidence that they were treated differently from others who were similarly situated. There is no evidence that other motel owners whose buildings were summarily abated (either downtown or elsewhere in the city) applied for and were granted permits to carry out repairs, nor is there any evidence of owners of other residential properties that had been summarily abated applying for and receiving such permits.

[7] Thus, the Patels failed to raise a genuine issue of material fact as to their claim of an equal protection violation and we therefore affirm the district court's grant of summary judgment.

II. Dismissal of Claim for Inverse Condemnation

A district court's decision whether to exercise supplemental jurisdiction is reviewed for an abuse of discretion. *O'Connor v. State of Nevada*, 27 F.3d 357, 362 (9th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1367 (1995).

Under 28 U.S.C. § 1367(a), a federal court has supplemental jurisdiction over claims "that are so related to claims in the action within [the district court's] original jurisdiction that they form part of the same case or controversy under Article III." Under 28 U.S.C. § 1367(c), a district court may decline to exercise supplemental jurisdiction over a claim if (1) the claim raises novel or complex state-law issues; (2) the claim "substantially predominates" over the court's original-jurisdiction claims; (3) the court has dismissed all the original-jurisdiction claims; or (4) in "exceptional circumstances" if there are "other compelling reasons" to decline.

Appendix A

The district court declined to exercise supplemental jurisdiction over the Patels' inverse-condemnation claim only after it granted summary judgment to all individual defendants on the § 1983 claim and to all defendants on the Fair Housing Act claim. In exercising its discretion, the court stated:

> I do that for this reason: The only federal claim remaining here is a *Monell* claim, by necessity a *Monell* claim, against the City under Section 1983. The State claim in inverse [condemnation] is based on the California Constitution. The thrust of the claim and what must be proved is that there is a public use taking, using a substantial factor test. There is a lot of different evidence; there's a lot of different theories. There, indeed is even a trier of fact, depending on which issue you're talking about, and I've come to the conclusion that it is the sort of thing that 1367 is designed to eliminate.

The court noted that the decision was not a casual one or made out of a desire to avoid work.

[8] The Patels argue that the district court's reasoning does not satisfy any of the statutory criteria of § 1367(c). However, the district court appears to have decided that the state-law claim for inverse condemnation substantially predominated over the § 1983 claim against the City for due process and equal protection violations, a permissible ground for declining supplemental jurisdiction under § 1367(c)(2). This decision was not an abuse of discretion. Indeed, given that the district court subsequently granted summary judgment on the Patels' substantive due process and equal protection claims, and that the Patels themselves abandoned their pre-closure procedural due process claim, the district court's decision appears to have been well justified. The claim that was actually finally tried — an alleged violation of post-closure procedural due process — would be a slender federal reed on which to base jurisdic-

tion over a state-law claim as substantial as inverse condemnation.

The Patels also argue that they were prejudiced by the district court's decision on December 3, 1992 to decline to exercise supplemental jurisdiction because the inverse-condemnation claim had been part of the joint pre-trial conference order of May 1992, and because trial was scheduled to begin on December 15, 1992. However, the district court recognized that its early-December decisions substantially changed the nature of the case. Therefore, at the same time that it dismissed the inverse-condemnation claim, it calendared a new pretrial conference date for March 1, 1993 and directed the parties to prepare "a new order and a new witness list and all that." It also directed that any remaining motion practice occur before that date. Given that the trial did not actually commence until over two years after the district court's decision to decline supplemental jurisdiction over the state-law claim, the Patels do not have any real argument that they were prejudiced by that decision.

We affirm the district court's decision to decline to exercise supplemental jurisdiction.

Alleged Trial Errors

I. Sufficiency of the Evidence

The Patels challenge the sufficiency of the evidence to support the jury verdict for the City on the Patels' claim of violation of their procedural due process rights. The City argues that the Patels have not preserved this issue for review because they failed to move for judgment as a matter of law at the close of all the evidence as required by Federal Rule of Civil Procedure 50(b).

The Patels did move for judgment as a matter of law at the end of the City's "re-opening" statement, but that motion was

denied and never renewed. This court has held that failure to comply with Rule 50(b) precludes a challenge to the sufficiency of the evidence on appeal, *Farley Transportation Co., Inc. v. Santa Fe Trail Transportation Co.*, 786 F.2d 1342, 1345-47 (9th Cir. 1985), and that "the requirement that the motion be made at the close of all the evidence is to be strictly observed," *id.* at 1346.[9]

In their reply brief, the Patels argue that an exception is made where there is no new evidence presented (or the evidence presented is very brief) after the motion is made, and thus, no one is misled or prejudiced by a formal failure to renew the motion.[10] The only authority cited for this proposition is a 1989 District of Nebraska decision. We need not decide whether this exception exists because it does not apply here. After the Patels' motion was denied, they called six witnesses, each of whom was subjected to both direct and cross examination, and read into evidence the prior testimony of one witness; this presentation of evidence occupies nearly 70 transcript pages. After the plaintiffs rested their case, the City read into evidence deposition testimony by one witness and recalled one of the Patels' witnesses, who was again subjected to both direct and cross examination.

---

[9]Rule 50(b) has been amended since *Farley* was decided, but the amendments do not appear to have changed the Rule as it applies in this situation. The first sentence still speaks of not granting a motion "made at the close of all the evidence" and the second sentence now speaks of the "movant" rather than of the "party who has moved for a directed verdict". *Compare* Fed. R. Civ. P. 50(b) *with Farley*, 786 F.2d at 1345 (quoting earlier version of Rule 50(b)).

[10]The Patels do not argue that their case falls into the exception for cases in which the judge takes the earlier motion for a directed verdict under advisement rather than deciding it. *Farley*, 786 F.2d at 1346. Nor do they argue that the somewhat liberal construction of what constitutes a motion at the close of evidence applies here. *Id.* at 1347 (giving as examples a request for jury instruction directing verdict, an objection to a jury instruction on the ground of insufficient evidence, or "inartfully made or ambiguously stated" motions).

The Patels' appeal does come within another "limited exception to the rule against review of the sufficiency of the evidence in the absence of a motion for a directed verdict: where there is 'plain error apparent on the face of the record that, if not noticed, would result in a manifest miscarriage of justice'." *United States v. 33.5 Acres of Land*, 789 F.2d 1396, 1400 (quoting C. Wright & A. Miller, 9 *Federal Practice and Procedure* § 2536 at 593 (1971)) (9th Cir. 1980). This exception, however, permits only " 'extraordinarily deferential' " review that is " 'limited to whether there was *any* evidence to support the jury's verdict, irrespective of its sufficiency'." *Benigni v. City of Hemet*, 879 F.2d 473, 476 (9th Cir. 1988) (emphasis added) (quoting *Herrington v. Sonoma County*, 834 F.2d 1488, 1500-01 (9th Cir. 1987), *cert. denied*, 489 U.S. 1090 (1989)).

[9] No evidence whatsoever was presented to the jury to prove that the Patels were given notice and an opportunity to be heard after the closure of the motel. The only evidence introduced supports exactly the opposite. Williams testified that he signed the October 29 letter notifying the Patels of the hearing scheduled for December 7, that he then gave the letter to his office's clerical staff, but that he did not know if the letter was mailed to the Patels or received by them. He did not testify as to whether the letter would have been mailed in the ordinary course of business. Daniel was questioned as to the mailing of various notices but was not questioned about the October 29 letter giving notice of the December 7 meeting. Mr. Patel testified at trial that he never received the October 29 letter notifying him of the hearing scheduled for December 7, and the City did not introduce the statement to the contrary in his prior sworn deposition to impeach that testimony. While the City did introduce Mr. Patel's declaration as evidence that he received the September 4, 1990 abatement notice and the September 26, 1990 correction notice, those notices did not apprise Mr. Patel of his right to be heard to contest the permanent closure of the motel; at the most, they notified Mr. Patel of his right to protest the City's determina-

tion that code violations existed at the motel. Thus, the jury was presented with no evidence from which they could have found that Mr. Patel received notice of the December 7 hearing from the City. Nor was there any opportunity to be heard on December 7, even if the Patels had been sent the letter. On December 7, the date scheduled for the post-closure hearing, the few Board members present immediately cancelled the Board meeting because they lacked a quorum. It therefore appears that there was no evidence to support the jury's verdict for the City and the judgment on the jury verdict must be reversed on this ground.

II. Denial of Motion for Directed Verdict

[10] The Patels also appeal the district court's denial of their motion for directed verdict at the close of the "re-opening" statements. We have held that where a party "fail[s] to move for judgment notwithstanding the verdict ... [the court] will not pass on the question whether a directed verdict was mandated by the evidence." *Kopczynski v. The Jacqueline*, 742 F.2d 555, 560 (9th Cir. 1984), *cert. denied*, 471 U.S. 1136 (1985). Because the Patels did not move for judgment as a matter of law after the jury's verdict against them, they have not preserved for appeal the question of whether the district court's denial of their motion for judgment as a matter of law at the close of "re-opening" statements was proper.

III. Designation of Mayor as Policymaker in Jury Instructions

The Patels assert that the district court erred in instructing the jury that W.R. Holcomb, the City's mayor at the time of the motel closure, was the official whose acts constituted final official policy of the City in respect to the giving of notice of post-closure proceedings. They argue that all of their evidence had focused on Penman, the elected city attorney, as the official policymaker. The identification of the official whose decisions constitute final policy is a question of law for the

judge to decide before submission of the case to the jury. *Jett v. Dallas Independent School District*, 491 U.S. 701, 737 (1989).

The City argues that the Patels failed to preserve this issue for appeal by not objecting to the instruction on the record at trial. Federal Rule of Civil Procedure 51 states that "[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."

The Patels submitted a proposed jury instruction on municipal liability. They left a blank for the insertion of the name of the decision maker. This was appropriate in that the court is to make that decision and instruct the jury as to who the decision maker is.[11] Once the matter is decided by the judge, there is nothing to object to in the instructions because, as we have noted, the issue is not one for the jury to decide. The judge has made that decision for them. What we must decide is whether the judge was right or wrong. We are inclined to remand to the district court for further consideration although it would be within our competence under *Jett* to consider the city code, charter, and other applicable state law, along with the evidence introduced at trial.

We have considerable doubt that the mayor was the decision maker in this matter. All of the evidence, what there was of it, pointed to the city attorney as the responsible person

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[11]In the proposed jury instructions they submitted to the court, the Patels included "Proposed Instruction No. 10" on municipal liability, the second paragraph of which read as follows:

> You are instructed that the _____ [was an official] [(were officials)] whose acts constitute final official policy of the City of San Bernardino. Therefore, if you find that the acts of the _____ deprived plaintiff of his constitutional rights, the City of San Bernardino may be liable for such deprivations.

with the authority to act and ratify. Nothing in the record suggests that the mayor was involved in deciding when or whether to deviate from holding a statutorily mandated hearing or ratified the failure to hold one. However, we prefer that the district court decide the matter in the first instance with such materials before it as allow it to make an informed decision. At the end of the trial, when the district court considered how to fill in the blank in the Patels' proposed instruction, the Patels argued that Penman was the official policymaker while the City's counsel argued that the appropriate policymaker was the mayor. Neither counsel adequately assisted the court.[12]

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[12]In finalizing the instructions, the court and counsel had the following colloquy on the instruction:

> THE COURT: Who is the final policy maker of the City of San Bernardino, Penman?
>
> MR. WEISER [Patel's counsel]: I believe so, your Honor, and I believe also Penman, as elected City Attorney, and also the Code itself codified by the Mayor —
>
> THE COURT: Well, we're talking about an official. Official means a person. His name is James Penman?
>
> MR. SIMMONS [City's counsel]: Your Honor, I don't believe he's presented any evidence as to who the policy maker was.
>
> MR. WEISER: Well —
>
> THE COURT: Well, you don't — it's in your interest that it be as high in the line as it can be.
>
> MR. SIMMONS: I would say the City Council makes the policy for the City of San Bernardino.
>
> THE COURT: Of course it does, but the person who enforces it and has the final word on the policy is James Penman, isn't it?
>
> MR. SIMMONS: Final word? I don't think so. I would say the Mayor.
>
> THE COURT: Who's the Mayor?
>
> MR. SIMMONS: John Minor.
>
> THE COURT: M-i-n-o-r?
>
> MR. SIMMONS: That time it was Mayor Holcomb.
>
> THE COURT: What's his first name?
>
> MR. SIMMONS: W.R. are the initials.
>
> THE COURT: Okay we'll see you at 1:30.

Appendix A

CONCLUSION

The district court's grant of summary judgment to the defendants on the Patels' substantive due process claim was proper because the Fifth Amendment preempts that claim. Summary judgment on the Patels' equal protection claim was proper because the Patels did not raise a genuine issue of material fact that the City acted pursuant to an irrational distinction. The district court did not abuse its discretion in declining to exercise supplemental jurisdiction over the Patels' state-law claim for inverse condemnation. The Patels failed to preserve for appellate review the questions of the propriety of the district court's denial of their motion for judgment as a matter of law at the end of the City's "re-opening" statement. We therefore affirm the district court on each of those issues. However, the evidence presented to the jury did not support its verdict for the City, since there was no evidence from which the jury could find that Mr. Patel received notice of his right to be heard at the December 7 meeting of the Board of Building Commissioners. Therefore, the judgment on the jury verdict must be reversed and the case remanded for further proceedings. Each party will bear its own costs on appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B — TRANSCRIPT OF PROCEEDINGS DATED DECEMBER 3, 1992

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE RICHARD A. GADBOIS, JR.,
JUDGE PRESIDING

NO. CV 91-1420-RG

AMRUT N. PATEL and SITA PATEL,

Plaintiffs,

vs.

JAMES F. PENMAN, et al.,

Defendants.

No. CV 91-3056-RG

FRANCIS KWAI CHONG FOO,

Plaintiff,

vs.

JAMES F. PENMAN, et al.,

Defendants.

Appendix B

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Thursday, December 3, 1992

LEONORE A. LeBLANC, CSR 2525
Official Reporter
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[2] APPEARANCES:

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For all Defendants except W.R. Holcomb:

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Appendix B

For Defendant W.R. Holcomb:

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* * *

[4] LOS ANGELES, CALIFORNIA; THURSDAY, DECEMBER 3, 1992; 10:30 AM

THE CLERK: Page 2, Item 3, Civil Docket Number 91-1420-RG, Amrut N. Patel, et al. vs. James F. Penman, et al.; and Civil Docket Number 91-3056-RG, Francis Kwai Chong Foo vs. James F. Penman, et al.

MR. MORILLO: Good morning, your Honor. Richard J. Morillo, Senior Assistant City Attorney, for all defendants in both matters except Mayor W.R. Holcomb.

MS. LUDVIGSEN: Cynthia Ludvigsen for W.R. Holcomb in both matters.

MR. WEISER: Good morning, your Honor. Frank Weiser for both plaintiffs in both matters.

THE COURT: Stay at the lectern, will you, Mr. Weiser.

I take it that everybody has received the advanced copy that I had faxed out yesterday with my rulings on the matters we discussed on Monday; is that correct?

MS. LUDVIGSEN: Yes.

MR. MORILLO: Yes, your Honor.

MR. WEISER: Yes, your Honor.

THE COURT: All right. After I did that I sat down and thought about this for a while, and I went over the pretrial conference order that was filed about six months ago, and I considered at length the present nature of this case, and I considered it particularly in light of my [5] decision to dismiss, obviously without prejudice, the State inverse case pursuant to the provisions in Section 1367(c) of Title 28, which is the codification of the old rule of *United Mineworkers vs. Gibbs*. It is almost a precise linguistic adaptation of that case.

I do that for this reason: The only federal claim remaining here is a *Monell* claim, by necessity a *Monell* claim, against the City under Section 1983. The State claim in inverse is based on the California Constitution. The thrust of the claim and what must be proved is that there is a public use taking, using a substantial factor test. There is a lot of different evidence; there's a lot of different theories. There, indeed is even a finder of fact, depending on which issue you're talking about, and I've come to the conclusion that it is the sort of thing that 1367 is designed to eliminate.

Mr. Weiser, just in case you may think that I'm casually doing this and that I am trying to avoid work, let me cite you to an article that I consulted, which may be of some assistance to you. It's in the Volume Number 24, the summer edition, 1992, this year, of the publication entitled *The Urban Lawyer.*

Mr. Morillo, you have that in your office, don't you?

That's the local Government section of the ABA's [6] regular publication, and it was sometime in the summer of 1992. It was at page 479 —

MR. WEISER: I think I've seen that article, your Honor.

THE COURT: — of Volume 24.

The thrust of the article, of course, is taking claims directly to Federal Court, and they're handled en banc and all of those problems, but the last part of the article discusses at some length the problems presented by a case like this, and I refer you to it.

While I'm not in the business of giving legal advice, I think the author of the article comes to the conclusion that you might be better off — well, as you will, because this is not, I don't think, a reviewable decision. And certainly if I made it under *United Mineworkers* it wouldn't have been.

You will be filing the case, I assume, in the Superior Court of San Bernardino, and you might well think about appending the federal claim to that one rather than trying it the other way around, but I'm not in the business of giving free legal advice. I sort of think that's what the author of this article said.

And, incidentally, I produced this article myself from literature, not one of my law clerks. I've studied it; all right? This is not a casual decision on my part.

[7] The net line is that the only remaining matter before this Court is, as I say, the 1983 case directed solely against the

City on the *Monell* theory. I reviewed the pretrial conference order, and, succinctly stated, I would not subject a jury next week to a case that is being governed by that order. I will put the matter over for a new pretrial conference order, and I'm going to put it over for about sixty days. That will give you some time to think about this, Mr. Weiser, about how you want to do it.

I think it will give the defendants time to consider whether or not in a very narrow — well, considerably more narrow posture that we find ourselves in this case that they may want to direct the motion practice to the remaining claim. I'm not suggesting anything by that, because I haven't given any thought to it because all this has happened quite recently. As you know, I was sitting out of District almost the entirety of the month of November. But on the off chance that that might be something you would want to do — I'm not sure what, but it's not my business to think that up either.

We'll have a pretrial conference date in sixty days. We'll have a new order and a new witness list and all that. If there is going to be any motion practice, it has to be done before that date. That's absolutely essential. In other words, the document I sign on that date —

[8] Which is what?

THE CLERK: Monday, February 8th, 1993 at 11:00 a.m.

THE COURT: The document I sign on that date will govern the trial absolutely, and there won't be any changes.

MR. WEISER: If I might be heard on that very briefly, your Honor.

First of all, as far as the date for the pretrial conference, I will be engaged in a trial in Judge Lew's courtroom in a matter with the U.S. Attorney's Office starting on February 6th.

THE COURT: When will that be over, do you think?

MR. WEISER: We estimated it will probably be about a two-week trial.

THE CLERK: February 6th is a Saturday. I assume — and Monday is a motion date, so I would assume that regardless he would still be available on Monday.

THE COURT: Well, he may need to get ready for the trial, so that's all right. He's got some thinking to do, too.

We'll put it over for another three weeks.

MR. WEISER: That's fine.

THE CLERK: Monday, March 1, 1993, at 11:00 a.m.

THE COURT: That's fine. I don't think Mr. Weiser expected to have all this thrown at him this morning.

[9] THE CLERK: That's for both cases; right?

THE CLERK: Yes, both cases.

These rulings apply to both cases. I don't think see any distinction between them for the purpose of the rulings that I've made.

MR. WEISER: If I might just briefly be heard, your Honor, as far as that article, I think I've read it briefly, and I've seen it —

THE COURT: Well, maybe you're the one they were talking about toward the end when they said the sly fellow will throw a 1983 case in here and then append his real honest to god case, which is a State constitutional claim for inverse. I was thinking to myself, is Mr. Weiser smart enough to have done that or not, and now you're telling me that you are. So they were talking about you.

MR. WEISER: Well, I saw that after Mr. Morillo's motion based on *Williamson County* (phonetic). I would say, though, that it seemed that article tended to say that — and I think I cited in the motion Mr. Morillo made based on *Williamson County* — that based on *First English* (phonetic), which was decided after *Williamson County* in 1987, that there is a possibility — and I believe the Ninth Circuit's decisions talked about that, and I cited a 1990 Ninth Circuit decision — I forget the exact cite— but that stated that one could possibly bring a 1983 claim to include [10] within the scope of it a Fifth Amendment violation.

THE COURT: I believe that the article would suggest you not do that, but we're getting into an academic discussion. I didn't see the article in any of the papers in this case, but I came across it, and I won't purport to have made a great academic study of all this, but I did read the article.

MR. WEISER: I just wanted to clarify — I, of course, read over your Honor's order that was faxed to me yesterday.

Appendix B

As to the issue of good faith, qualified immunity of the other individual defendants other than the council and Mr. Penman, I assume, of course, based on the *Monell* claim that we're talking about the good faith, qualifies immunity defense does not apply to the City and —

THE COURT: It does not.

MR. WEISER: — it is not in any way prejudicial to our 1983 claim against the City.

THE COURT: I don't know that the City has qualified immunity.

MR. WEISER: As I understand under *Roland vs. Independence Missouri* (phonetic) that it just doesn't apply.

THE COURT: Well, I think you're right. But if you and I are wrong, sometime in the next sixty days these folks will attempt to tell us that.

[11] MR. MORILLO: Two brief questions, your Honor.

THE COURT: Yes, sir.

MR. MORILLO: I just want to clarify that as to further law and motion matters you're saying that the defendants do have leave to bring an additional motion for summary judgment?

THE COURT: Or any other kind of motion. But by the day that I've set for the pretrial conference every conceivable motion should be over and done with.

MR. MORILLO: Understood, your Honor. And, secondly, with respect —

THE COURT: That goes to everybody. I mean, not just to you.

MR. MORILLO: Okay. Then with respect to yesterday's ruling we did not submit a judgment. Would it be necessary to submit a judgment?

THE COURT: Please do. I faxed the order to you just as soon as I signed it so you would be prepared to think about it on the long drive in here.

MR. MORILLO: Thank you, your Honor.

MR. WEISER: One last thing, your Honor.

Then the motion practice — the Court, of course, will entertain motion by our side for summary judgment also?

THE COURT: Of course.

MR. WEISER: Okay. And not precluding what we [12] have just indicated as far as what we thing possibly is contained within the scope of 1983 as far as whatever due process violations —

THE COURT: You better get on that pretty quick if you're going to do it.

MR. WEISER: The last thing, your Honor, as far as the qualified immunity, I notice there was specific language both as to the council, the Mayor, Mr. Penman and the other public

employees, language to the effect that they had immunity under various doctrines for the inspection and closure. The closure then being all the way, in Dr. Foo's case, to the date that he lost the motel or closure being the date that they actually closed it? Because our contention has been all along that what happened afterwards is more relevant than what happened before, after the closure, and —

THE COURT: You mean what happened on the part of the City, actions of the City?

MR. WEISER: That's correct. In other words, after they closed him down, the fact that they denied him the permits all the way — and then extended hearings that were close to a year-and-a-half —

THE COURT: Oh, yes, I think that's governed by qualified immunity. If you've been closed down, you can't participate in one of these redevelopment plans. I mean, [13] that's facially the way you think it ought to be, and that's basically what qualified immunity is all about.

MR. WEISER: Okay.

THE COURT: Okay, thank you all.

MR. MORILLO: Thank you, your Honor.

MS. LUDVIGSEN: Thank you, your Honor.

(Proceedings concluded.)

Appendix B

REPORTER'S CERTIFICATE

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

s/ Leonore A. LeBlanc
LEONORE A. LeBLANC
Official Reporter

May 4, 1995

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA FILED DECEMBER 2, 1992

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 91-1420 RG (Kx)

Amrut N. Patel and Sita Patel,

Plaintiffs

v.

James F. Penman, et. al

Defendants.

ORDER

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Defendants' Motion for Summary Judgment, or in the Alternative, for an Order Specifying Issues Without Substantial Controversy, came for hearing before this Court, Honorable Richard A. Gadbois, Jr., presiding, on November 30, 1992, at 10:00 a.m. Having considered the briefs, all pertinent papers, and arguments of counsel, the Court hereby makes the following conclusions of law and findings of fact:

1. In 1990, the City of San Bernardino devised and implemented a program systematically to inspect all motels in the City.

2. The Super 7 motel, owned by the Plaintiffs, was inspected on or about September 4, 1990, pursuant to an administrative inspection warrant issued by the Municipal Court of the County of San Bernardino.

3. The statute of limitations for an action arising under 42 U.S.C. § 1983 is equivalent to the forum state's statute of limitations for personal injury torts. *Wilson v. Garcia,* 471 U.S. 261, 279 (1985). In California this period is one year. Cal. Civ. Proc. Code § 340 (3).

4. The Plaintiff's Section 1983 cause of action accrued on September 4, 1990, when the City of San Bernardino closed the Super 7 motel. Therefore, the Section 1983 statute of limitations expired on September 4, 1991.

5. Because the individual Defendants were not named as parties to this lawsuit until March 2, 1992, the Plaintiff's Section 1983 cause of action against these Defendants is barred by the statute or limitations.

6. Members of local legislative bodies are entitled to absolute immunity from civil suits for damages based upon their legislative acts. *Kuzinich v. County of Santa Clara,* 689 F.2d 1345 (9th Cir. 1982) (enactment of general zoning ordinance is legislative act).

7. Defendants Estrada, Reilly, Hernandez, Maudsley, Minor, and Miller are elected members of the Common Council of the City of San Bernardino. These Defendants enjoy absolute legislative immunity for any acts undertaken in their role as Council members regarding the inspection and/or closure of the Super 7 motel. Therefore, these Defendants may not be sued under Section 1983.

Appendix C

8. A prosecutor is entitled to absolute prosecutorial immunity from civil suits for damages for his role in "initiating a prosecution and in presenting the State's case." *Burns v. Reed,* 111 S. Ct. 1934, 1942-44 (1991). As the San Bernardino city attorney, Defendant James F. Penman enjoys absolute immunity for his role in prosecuting the Plaintiff under the City housing code, therefore he may not be sued under Section 1983.

9. All public employees are entitled to qualified immunity when they engage in a course of conduct that a reasonable official would belief to be lawful. *Anderson v. Creighton,* 483 U.S. 635, 638 (1987).

10. When the relevant facts are undisputed, qualified immunity is a question of law to be decided by the court. *Act Up!/Portland v. Bagley,* 971 F.2d 298 (9th Cir. 1992).

11. All of the individual Defendants named in this lawsuit acted in an objectively reasonable manner with regard to their respective roles in the inspection and closure of the Super 7 motel, therefore they are all immune from suit under Section 1983.

12. For all of the above reasons, the Defendants' Summary Judgment Motion as to the Section 1983 claim against the individual Defendants is granted.

13. The Fair Housing Act, 42 U.S.C. § 3604 (b), prohibits discrimination "against any person in the terms, conditions, or privileges of sale or rental of a dwellings or in the provision of services or facilities in connection therewith, because of race, color, religion, set, familial statues or national origin."

14. The Fair Housing Act does not prohibit discrimination on the basis of economic statue. Accordingly, the Defendants' Summary Judgment Motion as to the Fair Housing Act claim is granted.

15. Article 1, § 19 of the California Constitution prohibits inverse condemnation by the State, and does not apply to individuals. Accordingly, the Defendants' Summary Judgment Motion as to the inverse condemnation claim against the individual Defendants is granted.

IT IS SO ORDERED.

s/ Richard A. Gadbois, Jr.
RICHARD A. GADBOIS, JR.
United States District Judge

DATED: December 2, 1992

APPENDIX D — RELEVANT STATUTE AND CONSTITUTIONAL PROVISION

28 U.S.C. § 1367:

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if —

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction.

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of any claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(Added Dec. 1, 1990, P.L., 101-650, Title III, § 310(a), 104 Stat. 5113.)

California Constitution Article 1, § 19:

§ 19. Eminent domain; just compensation; possession

Sec. 19. Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

(Added Nov. 5, 1974.)

No. 96-1527

Supreme Court, U.S.
F I L E D
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CLERK

In The

Supreme Court of the United States

October Term, 1996

AMRUT N. PATEL and SITA PATEL,

Petitioners,

vs.

JAMES F. PENMAN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUMMARY OF ARGUMENT

The petition essentially presents two questions for review. Both present moot issues since any resolution of either question will not affect the Ninth Circuit's opinion:

1. Petitioners ask this Court to review the standards for dismissal of state law claims under 28 U.S.C. § 1367(c). Although there are some minor disagreements among the circuits on the precise contours of the standard for dismissal, the district court's dismissal of state law claims in this case was proper under the standard of all circuits and under the plain language of the statute. To the extent any conflict exists, petitioners received review under the standard most favorable to their position.

2. Petitioners request this Court to decide whether their Fourth Amendment claim "controlled" over their Fifth Amendment claim. Plaintiffs never alleged a Fourth Amendment claim and the Ninth Circuit never decided whether a Fifth Amendment claim "controlled" over a Fourth Amendment claim. The petition is based on an issue not presented by the pleadings and never addressed by the Ninth Circuit.

PART I

"What standard of discretion governs a district court's decision to decline to exercise supplemental jurisdiction over a claim under 28 U.S.C. § 1367(c)?"

"Did petitioners' supplemental claim brought under 28 U.S.C. § 1367(c) substantially predominate over the original jurisdiction claims brought under 42 U.S.C. § 1983?"

The first two questions in the petition present the same issue: what is the proper standard for dismissal of supplemental state law claims under 28 U.S.C. § 1367(c)? This is not the proper case to decide the issue since under any conceivable interpretation of the statute, dismissal of the supplemental state law claims was proper in this case. There are in fact minor disagreements among the circuits

about the precise standard for dismissal of state law claims under § 1367. But none of the minor disagreements is relevant to this case since the district court's order was proper under the law of any circuit.

The only supplemental state law claim petitioners filed was inverse condemnation under the California Constitution. (See petition, pages 5-6) At the time this state law claim was dismissed, the only remaining federal claims were a procedural due process claim and a substantive due process claim. (See petition, page 6) The substantive due process claim was also dismissed before trial. (See petition, page 6) The only issue tried was whether the City had violated petitioners' procedural due process rights by denying them a post-closure hearing. (See petition, pages 6-7)

The circuits which have considered the issue are in accord that if a district court has jurisdiction over a supplemental state law claim, it may decline to exercise its jurisdiction only if one or more of the factors specified in section 1367(c) is met. *Executive Software United States, Inc. v. United States District Court*, 24 F.3d 1545, 1555-1556 (9th Cir. 1994) ("a court can decline to assert supplemental jurisdiction over a pendent claim only if one of the four categories specifically enumerated in section 1367(c) applies"); *McLaurin v. Prater*, 30 F.3d 982, 984 (8th Cir. 1994) ("The statute plainly allows the district court to reject jurisdiction over supplemental claims only in the four instances described therein"); *Palmer v. Hospital Authority*, 22 F.3d 1559, 1569 (11th Cir. 1994) ("supplemental jurisdiction must be exercised in the absence of any of the four factors of section 1367(c)").

Petitioners contend there is a conflict in the circuits whether a district court has discretion to dismiss supplemental state claims on grounds other than as specified in § 1367. In fact, although a few cases decided shortly after § 1367 was enacted considered that

question without deciding it, it is now settled that discretion comes into play only after the district court finds one of the § 1367(c) factors applicable. The Ninth Circuit follows this settled rule. *Executive Software*, 24 F.3d at 1555-1558; *O'Connor v. State of Nevada*, 27 F.3d 357, 363 (9th Cir. 1994), *cert. den.* 115 S.Ct. 1367.

The district court identified factors specified in three of the four subdivisions of § 1367(c) in support of its decision. Under the law of every circuit that has considered the issue, dismissal was proper under all three grounds. Again, there is no conflict for this Court to resolve.

A. THE STATE LAW CLAIM PREDOMINATED OVER THE FEDERAL CLAIMS

Section 1367(c)(2) allows dismissal if the state law claim "substantially predominates over the claim or claims over which the district court has original jurisdiction." Petitioners' state law inverse condemnation claim does in fact substantially predominate over the procedural due process claim:

1. The factual issues are completely different. The factual issue on the federal due process claim is whether adequate notice of a post-closure hearing was given, and if not, whether the lack of notice caused any damages. Petitioners expressly abandoned any issues about whether the hotel was properly closed. (Petition, page 6) In contrast, the factual issue on the state inverse condemnation claim is whether the hotel was properly closed.

2. The legal issues are different. The legal issue on the federal due process claim is what notice was required. The legal issue on the state inverse condemnation claim is whether petitioners' property was taken or damaged for public use within the meaning of the California Constitution.

The district court properly noted the different factual and legal issues as part of its basis for dismissing the supplemental state

law claim. (Petition, page 32a) These are proper grounds under the law of every circuit to consider the issue. *Diven v. Amalgamated Transit Union & Local 689*, 38 F.3d 598, 602 (D.C. Cir. 1994) (state law claims were more complex and required more judicial resources than did federal claims); *Soliday v. Miami County*, 55 F.3d 1158, 1165 (6th Cir. 1995) (state claims were "distinct and separable" from the federal claims); *Winn v. North American Phillips Corp.*, 826 F.Supp. 1424, 1425-1426 (S.D. Fla. 1993) (state law claims "require completely different elements of proof"); *In re Synergen, Inc. Securities Litigation*, 154 F.R.D. 265, 268-269 (D. Col. 1994) (negligent misrepresentation claim predominated over federal securities claim). The district court's decision is consistent with these cases.

B. THERE ARE "NOVEL AND COMPLEX ISSUES OF STATE LAW"

28 U.S.C. § 1367(c)(1) authorizes dismissal of supplemental state law claims if such claims involve "novel and complex issues of state law." Petitioners essentially alleged a regulatory taking of property by means of improper code enforcement. The contours of a California inverse condemnation claim in a case of this type are unsettled. California does not authorize an inverse condemnation action for damage caused by ordinary law enforcement efforts; the remedy is an action in tort. *Customer Co. v. City of Sacramento,* 10 Cal.4th 368, 378 (1995), *cert. den.* 116 S.Ct. 920 ("section 19 . . . never has been applied to require a public entity to compensate a property owner for property damage resulting from the efforts of law enforcement officers to enforce the criminal laws"). It requires a challenge based on regulatory action to be by way of a petition for writ of mandate or declaratory relief. *Hensler v. City of Glendale*, 8 Cal.4th 1, 13-14 (1994), *cert. den.* 115 S.Ct. 176. It allows a plaintiff to claim a permanent regulatory taking only if, after a temporary

taking is found, the public entity decides not to rescind its actions. *Hensler*, 8 Cal.4th at 14. The application of these rules to an action of this type is unsettled. A federal court attempting to decide these issues would have no basis for determining how a California court would rule.

Subdivision (c)(1) was designed to allow dismissal in cases of this type in order to eliminate the need for federal judges to attempt to predict the future course of state law when there is no reasonable basis for doing so. The circuits which have addressed the issue uniformly find dismissal proper when there is no settled state law to follow. *O'Connor v. State of Nevada*, 27 F.3d 357, 363 (9th Cir. 1994), *cert. den.* 115 S.Ct. 1367 (it is a novel and complex issue of state law whether a requirement that judicial candidates be attorneys violated the state constitution); *Doe v. Sundquist*, 106 F.3d 702, 708, n. 1 (6th Cir. 1997) (it is a novel and complex issue of state law whether disclosure of sealed adoption records violated state law); *Angelmyer v. Hamilton County Hospital*, 58 F.3d 533 (10th Cir. 1995) (it is a novel and complex issue of state law whether a hospital violated the Kansas Risk Management Act); *Chandler v. Miller*, 73 F.2d 1543, 1546, n. 3 (11th Cir. 1996), *reversed on other grounds*, ___ U.S. ___, 1997 WL 176382 (it is a novel and complex issue of state law whether a drug testing policy violates the Georgia constitution). The district court's order is consistent with decisions from every circuit to consider the issue.

C. THERE ARE "OTHER COMPELLING REASONS" FOR DECLINING DISMISSAL

Section 1367(c)(4) allows dismissal if there are "other compelling reasons for declining jurisdiction." This standard is also met under the law of any circuit to consider the issue:

1. The trier of fact is different. The trier of fact on the federal due process claim is the jury. *U.S. Constitution, Seventh*

Amendment. The trier of fact on the state inverse condemnation claim is the court sitting without a jury. Only if the court finds liability does the jury decide the amount of damages. *Coachella Water District v. Western Allied Properties, Inc.*, 190 Cal.App.3d 969, 974 (1987). If the district court had not dismissed the state inverse condemnation claim, it would have been required to conduct a separate court trial on the state law liability issues in advance of a jury trial on any remaining damages issues.

2. The measure of damages is different. On the federal due process claim, the damages are based on the harm caused by the lack of notice. See *Carey v. Piphus*, 435 U.S. 247 (1978) (absent proof that a hearing would have changed the result, the lack of a required hearing is a basis only for nominal damages). On the state inverse condemnation claim, the damages are based on the fair market value of the property taken by the government. *Housley v. City of Poway*, 20 Cal.App.4th 801, 807-808 (1993). Thus the potential damages on the state inverse condemnation claim are not only different but potentially greater than those available under federal law. The federal claim only concerns procedures while the state claim involves the substance of the City's action.

The district court noted the different trier of fact and the different theories under state and federal law. (Petition, page 32a) These are proper grounds for dismissal under subdivision (c)(4) under the law of any circuit to consider the issue. See *Hays County Guardian v. Supple*, 969 F.2d 111, 124 (5th Cir. 1992), *cert. den.* 506 U.S. 1087 (it is proper to dismiss supplemental state claims when related claims are pending in state court); *Hirschinger v. Allstate Ins. Co.*, 884 F.Supp. 317, 320-321 (S.D. Ill. 1994) (state and federal claims had different triers of fact).

D. SUMMARY

Although petitioners present this case as a vehicle for

resolving a conflict among the circuits, there is in fact no conflict to resolve. The circuits are in accord on all issues of any significance; the minor differences in the application of the uniform standard are not relevant to this case. To the extent any conflicts exist, petitioners received review under the law most favorable to their position.[1] There are no issues for this Court to address.

PART II

"Did petitioners' Fifth Amendment claim under the Fourteenth Amendment control over their Fourth Amendment claim under the Fourteenth Amendment?"

This question is based on a complete misunderstanding of the Ninth Circuit's opinion. The Ninth Circuit never considered whether a Fifth Amendment claim "controlled" over a Fourth Amendment claim. The question presented for review is not based on any issue presented by the pleadings or decided by the Ninth Circuit.

The Ninth Circuit actually addressed a completely different issue concerning substantive due process. The due process clause supports three completely different types of claims:

1. Claims based on the procedures used. These are referred to as procedural due process claims.

2. Claims based on the provisions of the Bill of Rights for which the due process clause is simply the means of application to the states.

---

[1]For example, petitioners contend their state law claims should have been dismissed only if authorized by § 1367(c) and not based on general discretionary factors. (Petition, page 12) The Ninth Circuit follows this rule. *Executive Software*, 24 F.3d at 1556-1557. It applied it in this case. (Petition, page 20a-21a)

3. Claims challenging the substance of a decision, rather than the procedures which led to it, based directly on the due process clause. See *Daniels v. Williams*, 474 U.S. 327 (1986) (Justice Stevens concurring); *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992); *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807, 812-813 (1994) (plurality opinion).

This Court has devised a detailed set of tests for deciding claims based on the specific provisions of the Bill of Rights. Some lower courts allowed plaintiffs to bring "substantive due process claims" as alternatives to claims based on the specific provisions of the Bill of Rights. The tests used to decide these substantive due process claims were different than, and in some cases inconsistent with, the tests used to decide claims based directly on the Bill of Rights.

In a series of cases, this Court held that if a provision of the Bill of Rights applies to a specified factual situation, the tests developed under that portion of the Bill of Rights should be applied rather than "general notions of substantive due process." *Graham v. Conner*, 490 U.S. 386 (1989) (pre-conviction excess force cases are analyzed under the Fourth Amendment, not "the more generalized notions of 'substantive due process'"); *Whitley v. Albers*, 475 U.S. 312 (1986) (post-conviction claims of use of excessive force are analyzed under the Eighth Amendment, not the due process clause); *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) ("the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended"); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 521, n. 25 (1981) ("the Due Process Clause does not afford a greater degree of protection to appellant's business than does the First Amendment"); *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807, 811 (1994) (plurality opinion)

("We hold it is the Fourth Amendment, and not substantive due process, under which petitioner Albright's [malicious prosecution] claims must be judged").

In *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc), the Ninth Circuit followed this line of cases.

> "Because the Fourth and Fifth Amendments provide explicit limitations on the type of government conduct challenged by the plaintiffs, *Graham* dictates that those Amendments, not the Fourteenth Amendment's guarantee of substantive due process, should guide the analysis of the plaintiffs' claim." 75 F.3d at 1320.

The opinion of the Ninth Circuit below, which followed the en banc opinion in *Armendariz*, simply applied this holding to the facts of the present case.[2] Petitioners alleged a substantive due process claim. The Ninth Circuit determined that since the conduct alleged under petitioners' substantive due process claim was covered by the "explicit limitations" of the Fifth Amendment, petitioners could not bring an independent substantive due process claim.

> "Here, the Patels challenge government conduct that is explicitly limited by the Takings Clause of the Fifth Amendment. . . . Because the Patels' substantive-due-process claim is preempted under *Graham* by the Takings Clause, we affirm the district court's grant of summary judgment on this claim." (Petition, pages 15a and 17a, footnote omitted)

Petitioners contend the Ninth Circuit decided the Fifth

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[2]The Ninth Circuit opinion in this case was written by the author of the lead opinion in *Armendariz*.

Amendment claim "controlled" over their Fourth Amendment claim. The Ninth Circuit actually addressed a completely different issue. In *Armendariz* the court found the plaintiffs' substantive due process claim preempted by the explicit textual provisions of both the Fourth and the Fifth Amendments. In the Ninth Circuit opinion below, the court decided that since the substantive due process claim was preempted by the Fifth Amendment, and since no Fourth Amendment claim was alleged, there was no need to decide whether it was also preempted by the Fourth Amendment.

> "The *Armendariz* court found the plaintiffs' substantive due process claim in that case preempted by both the Fourth and Fifth Amendments. 75 F.3d at 1318. Because the Patels' substantive due process claim is clearly preempted by the Fifth Amendment, we do not analyze whether the Fourth Amendment claim might also preempt their substantive due process claim." (Petition, page 16a, n. 7)

In short, the issue presented by the petition is not supported by the pleadings (there never was a Fourth Amendment claim), was never presented to the Ninth Circuit, and was never considered by the Ninth Circuit.[3] There is nothing for this Court to review.

---

[3]The language of the petition is based on *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993). The Ninth Circuit follows the holding of *James Daniel Good Real* that more than one amendment can apply to a single case. *Armendariz*, 75 F.3d at 1320. Its holding in *Armendariz* and the opinion below is only that a plaintiff may not pursue an independent substantive due process claim when the alleged conduct is within the scope of a specific constitutional provision. This holding is fully consistent

CONCLUSION

This petition presents moot issues. The order dismissing the supplemental state law claim is proper under the law of any circuit; there is no conflict to resolve. The other question for review is based on a complete misunderstanding of the Ninth Circuit's opinion and is not based on any issue considered or decided by the Ninth Circuit. For all the foregoing reasons it is respectfully submitted that the petition should be denied.

Respectfully submitted,

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with this Court's own precedents.

(3)

FILED
MAY 2 1997
CLERK

No. 96-1527

In The

Supreme Court of the United States

October Term, 1996

AMRUT N. PATEL and SITA PATEL,

Petitioners,

vs.

JAMES F. PENMAN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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FURTHER REASONS FOR GRANTING THE WRIT

I.

THE STATE CONSTITUTIONAL CLAIM DID NOT "SUBSTANTIALLY PREDOMINATE" OVER THE FEDERAL CONSTITUTIONAL CLAIM.

The San Bernardino Municipal Code gave officials the summary power to enter onto petitioners' property and close their motel for purposes of nuisance abatement. (Petition, p. 9a). The same statute also requires that "immediately after" the abatement, the City provide property owners the opportunity of a post-deprivation hearing. (Petition, p. 9a).

City officials summarily entered onto petitioners' property, pursuant to an administrative warrant, inspected the motel and closed it, relocated the tenants living at the motel, and "meaningfully interfered" with petitioners ownership rights to the property after the closure of the motel. (Petition, pp. 8a-12a).

The City never provided petitioners with a post-deprivation hearing. (Petition, pp. 24a-25a).

While the two claims "are not in anywise necessarily connected", *Dewey v. Des Moines*, 173 U.S. 193, 198, 19 S. Ct. 379, 381, 43 L. Ed. 665 (1899), and are analytically severable, respondents have not addressed petitioners central claim, that 28 U.S.C. § 1367(c)(2) must be qualified by the Court's time-honored constitutional doctrine that holds that a federal court may resolve a case solely on the basis of a pendent state-law claim, and that in fact the court should usually do so in order to avoid federal constitutional questions. (Petition, p. 15) (*citing Pennhurst State School & Hosp. v. Holderman*, 465 U.S. 118,

104 S. Ct. at 917, 79 L. Ed. 2d 67 (1984); *Schmidt v. Oakland Unified School District*, 457 U.S. 594, 102 S. Ct. 2612, 73 L. Ed. 2d 245 (*citing Hagans v. Lavine*, 415 U.S. 528, 546, 94 S. Ct. 1372, 1383, 39 L. Ed. 2d 577 (1974) and *United Mineworkers of America v. Gibbs*, 86 S. Ct. 1130 (1966)).

The doctrine is of such importance that this Court has refused to decide constitutional questions when the record discloses other grounds of decision, whether or not they have been properly raised in a petition by the parties. *Neese v. Southern Railway Company*, 350 U.S. 77, 76 S. Ct. 131, 132.

A remand to the District Court to consider the effect of 28 U.S.C. § 1367(c)(2) in light of this issue is in order on this ground alone.

Litigating the inverse condemnation claim in state court does not preclude petitioners from bringing a subsequent federal takings claim in federal court, but litigating the state claim in this action will preclude a further action. *England v. Louisiana State Bd. of Med. Exam.*, 375 U.S. 411, 417, 84 S. Ct. 461, 465 (1964); *Dodd v. Hood River County*, 59 F.3d 852, 859-60 (9th Cir. 1995).

Under California law, the District Court sitting without a jury would first determine liability on the state inverse condemnation claim before liability would be determined on the procedural due process claim. (Respondent's Brief, p. 6).

Moreover, the issue of whether the closure of the motel itself was "justified" has not been waived.

A trial was held only on the issue of procedural due process, since petitioners substantive claims were dismissed prior to trial. (Petition, p. 13a).

Petitioners abandoned their claim that their rights to procedural due process were violated by the lack of the City providing a pre-deprivation hearing before the motel was closed, and the sole issue at trial was whether the City provided a prompt post-deprivation hearing after the closure of the motel. (Petition, pp. 13a-14a).

"[T]he categories of the Due Process Clause under the United States Constitution are distinct," and, "[w]ere the rule otherwise, the Clause would be reduced to a mere tautology." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543, 105 S. Ct. 1487, 1493 (1985).

Respondent overlooked petitioners quote by the California Supreme Court to the effect that "[B]oth eminent domain proceedings and inverse condemnation actions implement the constitutional rule that private property may not be 'taken' (U.S. Const., 5th Amend.) or 'taken or damaged' (Cal. Const., Art. I, § 19) for public use without just compensation." (Petition, p. 16) (*citing San Diego Gas and Electric Company v. The Superior Court of Orange County*, 55 Cal. Rptr. 2d 724, 752 (Cal. 1996)).

And California law is settled that one of the modalities of an inverse condemnation action under Article I, § 19 of the California Constitution is when, "a public entity . . . physically invades that property in any tangible manner." (Petition, p. 16) (*citing San Diego Gas and Electric Company*, 55 Cal. Rptr. 2d at 753).

The San Bernardino Municipal Code authorized an unwanted physical occupation of petitioners' property, amounting to a per se taking. *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 533, 112 S. Ct. 1522, 1531 (1992).

Petitioners also contend that the City's post-closure actions,

denying petitioners the right to reopen the motel, "does not substantially advance legitimate state interests [and] denies [petitioners] economically viable use of [their] property." *Landgate, Inc. v. California Coastal Commission*, 97 DJ DAR 1345 (2/11/97) (*citing Lucas v. South Carolina Coastal Council*, 505 U.S. 1015-16 (1992)).

If the District Court first holds a bench trial on the state claim, it may resolve factual issues obviating the need of a trial on the federal due process claim.

Resolution of whether the deprivation was justified may also resolve an issue of damages related to the federal procedural due process claim. *Carey v. Piphus*, 435 U.S. 262, 98 S. Ct. 1042, 1052 (1978) ("[M]orevoer, where a deprivation is justified but procedures are deficient, whatever distress a person feels may be attributed to the justified deprivation rather than to deficiencies in procedure. But as the Court of Appeals held, the injury caused by a justified deprivation, including distress, is not properly compensable under § 1983. This ambiguity in causation, which is absent in the case of defamation per se, provides additional need for requiring the plaintiff to convince the trier of fact that he actually suffered distress because of procedural due process itself.").

Respondent's argument that in other respects, the state claim "substantially predominates" over the federal claim, also misapprehends the Court's precedents and the holding of the California Supreme Court.

1. As stated previously, the issues arise from a common nucleus of facts that forms the necessary Article III subject matter jurisdiction under 28 U.S.C. § 1367(a).

2. While the legal issues are analytically severable, that in itself does not make them "distinct and seperable" from the federal claims for purposes of 28 U.S.C. § 1367(c)(2). (Respondent's Brief, p. 4) (*citing Soliday v. Miami County*, 55 F.3d 1158, 1165 (6th Cir. 1995)).

In fact, if the claims arise out of a common factual nucleus, logically and in the interest of judicial economy, one would expect to litigate a takings claim and procedural due process claim together. *Dewey v. Des Moines, supra.*

II.

THE STATE CONSTITUTIONAL CLAIM DOES NOT PRESENT "NOVEL AND COMPLEX" ISSUES OF STATE LAW.

Since as stated previously, the California Supreme Court and other state appellate courts have definitively ruled and clarified that a case such as this one falls within the category of Article I, § 19 of the California Constitution, there is no need for the District Court "to attempt to predict the future course of state law when there is no reasonable basis for doing so." (Respondent's Brief, p. 5).

Respondent has misstated the state law on the subject.

California courts have recognized that the "taken or damaged" clause of Art. I, § 19 of the California Constitution does not always require a measure of damages for "just compensation" based on "fair market value". *Housley v. City of Poway*, 20 Cal. App. 4th 801, 807-08 (1993) ("[T]he courts have recognized, however, that just compensation may, under unusual circumstances, require an application of a different measure.").

III.

THE STATE CONSTITUTIONAL CLAIM DOES NOT PRESENT "COMPELLING REASONS" FOR DECLINING JURISDICTION.

As stated previously, the fact that the District Court would sit as the trier of fact tends to favor petitioners argument that resolution of the state law claim will obviate the need to litigate the federal constitutional claim.

Also as argued, the issue of whether the deprivation was "justified" bears on resolution of the federal constitutional claim for damages.

The unique facts in this case, provide the "exceptional circumstances" and "other compelling reasons" to exercise jurisdiction over the state law claim, even under the Ninth Circuit's standard of discretion.

IV.

THE COURT SHOULD CLARIFY THE STANDARD OF DISCRETION TO DECLINE JURISDICTION UNDER 28 U.S.C. § 1367(c).

Respondent at least concedes that "[t]here are in fact minor disagreements among the circuits about the precise standard for dismissal of state law claims under § 1367." (Respondent's Brief, p. 1-2).

The Court does not require a complete circuit split to clarify an important area of federal law. *Matsushita Electric Industrial Co., Ltd. v. Epstein,* 515 U.S. __ (1995).

This is all the more compelling under a congressional statute conferring subject matter jurisdiction to the federal courts. (Petition, pp. 10-11).

Respondent has misapprehended petitioners argument.

The question is not whether "discretion comes into play only after the district court finds one of the § 1367(c) factors applicable" (Respondent's Brief, p. 3), but rather defining the proper scope of discretion under § 1367(c), which as petitioners argue, is an "exceptional circumstances" standard.

The statute's explicit language and legislative history appear to mandate the same conclusion, and awaits clarification by the Court to finally determine the matter.

V.

THE FOURTH AMENDMENT CLAIM UNDER THE FOURTEENTH AMENDMENT PROVIDES PETITIONERS A SEPARATE EXPLICIT TEXTUAL SOURCE OF CONSTITUTIONAL GUARANTEE THAT WAS NOT PREEMPTED BY THEIR FIFTH AMENDMENT CLAIM UNDER THE FOURTEENTH AMENDMENT.

Petitioners clearly understand the Ninth Circuit's opinion as it is written.

The issue as phrased, derives from the explicit language of the Court in *United States v. James Daniel Good Real Property*, __ U.S. __, __, 114 S. Ct. 492, 499 (1993) ("[T]he proper question is not which Amendment controls but whether either Amendment is violated.").

While the court has "repeatedly rejected the view that the applicability of one constitutional amendment preempts the guarantees of another", *United States v. James Daniel Good Real Property* at 499, the Ninth Circuit held otherwise. (Petition, p. 16a, n. 7) ("[b]ecause the Patels' substantive due process claim is clearly preempted by the Fifth Amendment, we do not analyze whether the Fourth Amendment might also preempt their substantive due process claim.")

The Ninth Circuit should have separately analyzed petitioners' substantive due process claim under the Fourth Amendment, and then independently determine under the standard of the "explicit textual source" whether summary judgment was proper.

As the Ninth Circuit stated, this case arises out of circumstances similar to those involved in *Armandariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996). (Petition, p. 6a, n. 1) *See also Macri v. King County*, 97 DJ DAR 5072, 5075, n. 5 ("[O]ur decision in *Armanderiz* has been affirmed by a three judge panel on facts virtually identical presented in *Armanderiz*. *Patel v. Penman*, No. 95-55213, 1996 WL 734757 (9th Cir. Dec. 26, 1996)).

The Ninth Circuit's analysis in this case tracks the exact analysis in *Armanderiz*, (Respondent's Brief, pp. 9-10), except that in *Armanderiz*, the Ninth Circuit analyzed plaintiffs' substantive due process claim under both the Fourth and Fifth Amendment and found it was preempted by the explicit textual sources since the specific amendments were not specified in the pleadings. (Petition, p. 16a, n. 7), *Armanderiz*, 75 F.3d at 1324, n. 9.

The Court's doctrine that a generalized due process claim must be analyzed under an explicit constitutional guarantee, is

no more, than a "guide for analyzing [a plaintiff's claims]", and not a new pleading requirement imposed on plaintiffs in a § 1983 action. *Albright v. Oliver,* 510 U.S. 266, __, 114 S. Ct. 807, 813 (1994) (Rehnquist, C.J. for plurality) (*quoting Graham v. Conner,* 490 U.S. 386, 395 (1989)).

Respondent's argument that the issue was never presented to the Ninth Circuit has no merit, since it is not a jurisdictional concern, but presents at most a prudential concern that is adequately addressed by the complete factual and legal record in *Armanderiz* and in this case. *Youakim v. Miller,* 425 U.S. 231, 234; *Webb v. Webb,* 451 U.S. 493, 500, 101 S. Ct. 1889, 1893, 68 L. Ed. 2d 392 (1981).

Under the "mere enlargement doctrine", "[p]arties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed." *Bankers Life and Cas. Co. v. Crenshaw,* 486 U.S. 71, 76, n. 2, 108 S. Ct. 1645, 1650, n. 2 (1988).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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